CHAPTER III

INSPECTION DOCUMENTATION

A. Case File Documentation.

1. **Guidelines/ File Set-up.** Detailed, complete and accurate case files are essential to effective enforcement of VOSH laws, standards and regulations. Uniform case file and procedures assure that the establishment, content, organization and processing of all VOSH Enforcement files are consistent across all regions and that all violations are properly documented. All necessary information relative to violations shall be obtained during the inspection, using means deemed appropriate by the CSHO (i.e., notes, audio/videotapes, photographs, and employer records). The following case files procedures shall be followed by all VOSH enforcement and administrative staff.

   a. **Types of files**. All safety and health inspections and investigations conducted as a result of a programmed inspection, referral, complaint, accident or fatality will be properly and completely documented and filed in the prescribed manner.

   b. **Location of files.** Official case files containing all original documents (with the exception of original IMIS data entry forms) will be filed and maintained in the appropriate field office.

      When a case file is forwarded to the regional or central office for significant case or other review, the "official," or original, case file will be forwarded for review. When forwarding by mail, the case file will be sent in a separate package via the specific professional courier/parcel service recommended by the DOLI Manager of Technical Services. The date the file was sent will be logged for tracing purposes in case it is lost.

   c. **File Size.** All VOSH non-significant case files will be filed in letter-sized case file folders. All documents will be affixed to the folder with standard fasteners.

      All significant case files shall be filed in four-part folders.

      Each office services supervisor is responsible for assuring that a sufficient supply of letter-sized and four-part folders are provided to each field office.

A.1. **d.** **Filing Responsibilities**. The office services supervisor in each region shall assign a primary clerical person to set up and maintain all established VOSH Enforcement case files in each field office. The assigned clerical staff will type labels, type documents, file and maintain all case files in assigned file cabinets in accordance with these procedures.

The VOSH Compliance Officer is responsible for each file generated and will assure the accuracy and completeness of the documents; will establish the file and label, tab, and affix the documents in accordance with these procedures.

e. **Labeling of Files.** All case files will have a tab to which a label will be affixed. All labels shall be typed, and shall contain the following information:

EMPLOYER/COMPANY NAME	(typed as filed in all CAPS)
INSPECTION NUMBER	CSHO/ID NUMBER
LOCATION	(City/County)

The inspection date for the purpose of labeling files will be one of the following: (1) for "No Inspection" case-- the date the case was closed; (2) for "In Compliance" cases – the date the case was closed; (3) for "Cases where Citations were Issued" – the citation issuance date; and (4) for "Non-formal Complaints Handled by Letter: – the date the complaint was closed. This date may be handwritten on the label at the time the case is closed.

Color-coded labels may be used to denote different calendar years. This will assist the clerical staff when purging the files as per this Chapter.

f. **Filing sequence.** All case files will be filed in alphabetical order, by employer/company name.

g. **Completion of Establishment Name.** Proper format of the establishment name, in compliance with OMDS guidelines, is important to ensure that citations and other legal documents reference the correct establishment and also to ensure the proper establishment history linkages.

A.1.g

If an inspection is scheduled for a site and **no establishment name** can be given because the site is not found, work has not started, work has been finished, etc, enter "UNKNOWN" in establishment name to indicate no establishment name is available.

Enter the legal name of the establishment, if known. For a sole proprietorship, or a partnership, this is the trading name of the establishment.

For a corporation, **enter the name of the corporation UNLESS a subsidiary of the corporation controls** the establishment inspected. In that case, enter the name of the subsidiary.

If an employer is **doing business under a name other than the legal name** of the establishment, both names may be entered, using the **"dba"** (doing business as) or **"aka"** (also known as) acronym. Enter the legal name FIRST, for example

Pioneer Steel **dba** Jackson Steel Works.

If abbreviations are part of the legal name, **use the legal abbreviations.** If abbreviations are necessary because the name would otherwise be longer than 50 characters, abbreviate words at the end of the name. Where a state name is part of a company name, either abbreviate all the time using the U.S. Postal Service alphabetic abbreviation or never abbreviate it. Be consistent.

For names that include an individual's first name or initials, the first name or initials should precede the last name. For **multiple inspections** at an establishment, where the cases are concurrently open, include the inspection number after the name.

CORRECT	INCORRECT
E W Barnes Masonry	Barnes EW Masonry
Joe Jones Construction	Jones Joe Construction
J C Penney Co Inc	Penney J C Co Inc
J R Johnson Inc #123450001	Case File 1: Johnson J R Inc
J R Johnson Inc #123450002	Johnson Inc, Case File 2

A.1.g. If **"The"** is the first word in a company name, put it first, do not omit it or put it at the end:

CORRECT	INCORRECT
The General Store	General Store
The Only Tire Store	Only Tire Store, The

For **local jurisdictions** and all other non-state agencies, the jurisdictional name should precede the specific "Office of" or "Dept. of". For **state agencies**, the name (or acronym or abbreviation if it is in common usage) should precede the geographic location followed by the inspection number.

CORRECT	INCORRECT
City of Norfolk, Dept. of Sanitation,	Norfolk, Sanitation, City of, Department of
VA, Dept. of Ag., Danville # 987654321	Danville, Dept of Agriculture, state,
VDOT, Franklin Co., # 123456789	
VA. Dept. of Health, Franklin City, # 000123456	

Corporate tracking is essential for establishment history linkage of the company or division. Where an activity pertains to a particular division or section of a company and that fact is to be reflected on the form, but the establishment linkage is to be maintained on the whole establishment, put the company name first , followed by the division:

CORRECT	INCORRECT
St Regis Paper Co Kraft Div	Kraft Div - St Regis Paper Co
St Regis Paper Co Paper Mill	Paper Mill - St Regis Paper Co

Where a **subsidiary is inspected** and the name of the parent company is to be reflected on the form, but the establishment linkage is to be maintained on the corporate subsidiary level, put the subsidiary name first, followed by the parent corporation name:

CORRECT	INCORRECT
Buffalo Tank Div of Bethlehem Steel (This links "Buffalo Tank Division")	Bethlehem Steel Buffalo Tank Div
Maxwell House Division of General Foods (This links "Maxwell House Division")	General Foods - Maxwell House Division

Place **punctuation** (apostrophes, hyphens, etc. where they belong in the name. Use an ampersand (&) not the word "and" where applicable.

CORRECT	INCORRECT
Jenkins & Sons	Jenkins and Sons

When **numbers are a part of an establishment name**, write them the way the trading name of the establishment is written. If the trading name uses numerals, don't spell out the number. In the case of **store numbers** use numerals preceded by a pound sign (#) to indicate a particular store.

CORRECT	INCORRECT
4 H Steel Products Co	Four H Steel Products Co
A 1 Used Cars	A One Used Cars
5000 Club	Five Thousand Club
Great Atlantic & Pacific Tea Co # 102	Great Atlantic & Pacific Tea Co No. 102

A.1. h. Completion of Site Address. The site address specifies the location where the inspection was conducted. It **may** also be the mailing address of the establishment. The site address consists of street address, city name, state, abbreviation and zip code. **It cannot be a post office box (P. O. Box).** If no street address can be determined, but a commonly recognized project name will locate the site, the project name may be entered.

If more than one set of numbers is applicable put the street address first.

3811 Peachtree Street, Suite 120

123 Merritt Parkway, Box 24*

***** *Note that in this example above the box number is part of the mailing address. It is not a post office box.*

Numbered Streets may be spelled out or written with numbers

3815 First Street OR 291 16th Street

Numbered Highways should be written with numbers.

Hwy 41 North OR Interstate 95

A.1. i. Segregation and Layout of Files. All "Closed" safety and health case files will be filed together according to the parameters of this chapter in a separate location from "Open" files. There will be no grouping, arrangement, or segregation of closed files by Safety, Health, CSHO, or any other criterion.

All "Open" case files, both significant and non-significant cases, will be filed together. All "Open" inspection case files, regardless of how they originated, (general inspection, referral, complaint, accident/fatality) will be filed together. There will be no grouping, arrangement, or segregation of closed files by Safety, Health, CSHO, or any other criterion.

VOSH Enforcement files will be filed in the same manner throughout all regions of the State.

j. Records Retention. All VOSH enforcement case files shall be retained for three calendar years after the year in which the case is closed.

All administrative correspondence and data files shall be retained for three calendar years after created. Complaint files shall be retained for three calendar years after the complaint file is closed.

All cases with written-off penalties shall be forwarded to the Agency Accounts Receivable Coordinator three calendar years after final action other, than penalty collection, is completed.

Files shall be purged and destroyed on an annual basis by burning, shredding or pulping.

Records disposition concerning retention, purging and destruction shall be the responsibility of the office services supervisor and shall be in accordance with the Agency Policy Statement as promulgated by the Agency Records Manager.

A.1. k. Case File Establishment. Upon initiation of an investigation, the working case file will be immediately established.

A **case diary log** will be maintained **for all investigations.** It shall record a concise, chronological account of all actions taken from the beginning of the investigation to the closing of the case, It will include, but not be limited to, all material contacts with the inspected company, the date, person contacted, and synopsis of the topic discussed or a reference to an exhibit elsewhere in the case file especially where it supports findings in the narrative. This log will be maintained on the appropriate VOSH form and will be used to prepare the narrative and other related documents.

As **evidence and documentation** are gathered in support of investigative findings; these items will be tabbed, referenced in the case diary log, and filed in the case file folder. Required forms such as the VOSH-1, IW-1, Sampling Forms, etc. will be included as they are completed.

The **narrative** will be written upon completion of the investigation sufficient documentation has been gathered to finalize findings and conclusion. The Narrative shall refer to exhibits to support it rather than the case diary log. Once the narrative is written, the case file folder will be officially organized with all documents properly affixed in the prescribed order. The case diary log and narrative must be complete but may be handwritten legibly if the case is not significant.

Significant cases (or cases which become significant during the supervisory review), the case diary log and the narrative will be legible, and the documents and other contents filed in a properly labeled **four-part folder.**

l. Specifics of Case File Documentation. The case file shall consist of all required IMIS forms, checklists, case diary log, narrative, citations, penalty assessment documents, court documents and all evidence and documentation gathered during the investigation in support of the findings and conclusions.

Documentation and collection/preservation of evidence is critical for all inspections/investigations. Every finding or fact and conclusion must be supported by documentation. This documentation is vital to the defense of any actions taken by the Commissioner as a result of the CSHO's findings. "Documentation" includes an inspector's first hand observation as an eyewitness at the inspected site.

The nature and type of evidence/documentation needed varies with each case. Those reviewing the case file will want to picture exactly what the CSHO saw and did at the time of the inspections/investigation. Therefore, documented evidence must be contained in the file to allow the reviewer (whether it is the Compliance Manager, Commissioner, Commonwealth's Attorney or Judge) to be aware of the situation that existed at the time of the CSHO's inspection. At a minimum, all files will answer the questions: **Who, What, When, Where, Why and How.**

If VOSH violations are determined and citations are issued, the case file must contain evidence that:

A.1.l.

(1) A standard, regulation, or statute applies to the hazard in question;

(2) The employer has violated the standard, statute or regulation in question;

(3) The employer has actual or constructive knowledge of the violative condition;

(4) An employee of the employer is exposed to the violative condition. Each cited standard is applicable to the employer.

The following represents examples of the types of documentation/evidence needed, if available and germane to the case:

- names, addresses, telephone numbers of all witnesses
- witness statements
- employee statements
- employer statements
- company investigative reports
- photographs
- sketches, diagrams of accident scene
- measurements

- sampling/test results
- medical reports
- autopsy reports
- police reports
- involved personnel job descriptions
- personnel training records
- employer training or safety manuals
- pertinent management policies and procedures
- equipment specifications, identification numbers
- equipment parts
- equipment maintenance records or operating log
- equipment purchase or repair records - checklists, worksheets completed by the CSHO
- applicable standards.

Certain evidence must be properly protected once collected to ensure that it is not damaged, altered, or lost. Proper tagging must be done; "chain of custody" procedures must be followed. This is especially important with certain physical evidence such as samples or damaged machine parts or safety equipment.

Employee complaints and signed statements are confidential and will be withheld from disclosure. Because of this, it is absolutely necessary that employee statements are limited to actual statements. If the employee has nothing relevant to the subject matter to add, then the information should be incorporated into the narrative but not set aside on a signed witness statement.

As documents are gathered, they should be tagged, referenced in the diary log and filed. If evidence collected does not "fit" in the case file–such as a broken part, it should be kept in a separate, properly tagged and labeled container and referenced or described in the file.

A.1. m. Content and Content Order/Organization -Significant Cases

(1) The case file for significant cases will contain six (6) sections: Those sections will contain the following:

SECTION 1 - Case diary log;
Narrative;
Citations;
Penalty Calculation Sheet.

SECTION 2 - Exhibits grouped and tabbed

SECTION 3 - Post citation documents and correspondence

SECTION 4 - All legal/court documents

SECTION 5 - Freedom of Information documents

SECTION 6 - Other exhibits and documents

A.1.m. **(2)** The following describes in detail the content and order of each section:

(a) SECTION 1 of the file folder will contain in order:

1 Diary Log;

2 Narrative;

3 Justification for willful citation(s) (if applicable);

4 Citation(s) in draft form.

(b) SECTION 2 of the file folder will contain the following documents, in order:

1 Case review sheet;

2 Routing sheet;

3 List of exhibits (lists in order all documents contained in Section 2);

4 Behind the list of exhibits, also in Section 2 of the file, the exhibits will be grouped and filed in the following order. These groupings shall be tabbed. Individual documents will be numbered in the bottom right hand corner of the page and referenced by tab number in the case diary log, when used, and also by the narrative report. (For example, interview statements would be numbered 1a, 1b, 1c, etc.)

a Interview Statements;

b VOSH-1B Forms with Pictures;

c Sketches, Diagrams, etc.;

d Medical/Police reports;

5 VOSH Forms;

6 Pre-Citation Correspondence;

7 Inspection History;

8 Inspector notes

(c) SECTION 3 of the file folder will contain all post-citation forms, documents, and correspondence associated with the citation and the penalty assessment. The most recent documents will be filed on top; all will be filed chronologically. All mailing certification cards will be filed with the appropriate letter.

The following documents shall be filed in SECTION 3:

1 Post-Citation Forms, etc.;

2 Penalty Payment Report;

3 Failure to Abate;

4 Amended Citations;

5 Settlement Agreement;

6 Abatement Letters;

7 Notification to Commonwealth's Attorney of Contest;

8 Notice of Contest;

9 Informal Conference Report;

10 Informal Conference Notice.

A.1.m(2)

(d) SECTION 4 of the file folder will contain all documents associated with civil or criminal court action. The most recent documents will be filed on top; all will be filed chronologically.

The following documents will be filed in SECTION 4 when applicable:

1 Summons

2 Subpoena

3 Final Order

4 Other Contest Documents

(e) SECTION 5 of the file folder will contain all documents and correspondence related to Freedom of Information Requests.

(f) SECTION 6 of the file folder will contain documents, exhibits or other correspondence related to the case and not filed in other sections of the file folder the following documents will be filed in section 6, when applicable:

1 Company Policies, Procedures, Equipment Manuals, Equipment Specifications, Contracts, etc.

2 All other material (letters, etc.) related to the case and not filed in other sections.

All significant cases will be filed in four-part file folders with the exhibits in section 2 tabbed using prepared legal file dividers. Non-significant cases will be filed in letter sized file folders with sections 1, 3 and 5 attached to the left side of the folder, and sections 2, 4 and 6 filed on the right side.

3 For non-significant cases, section 1 will be on the left side of the folder. Section 2 will be on the right side of the folder. Section 3 will be on the left side on top of section 1 in chronological order with the most recent on top.

A.1. **n.** **Case File Review and Processing.** The Compliance Manager is responsible for assigning and monitoring all case inspection/investigations. The Compliance Manager shall review the work of all assigned CSHOs to ensure that proper investigative techniques are being utilized, that proper evidence and documentation are gathered, that all findings and conclusions are substantiated, that the narratives are properly written and that the case files are finalized in a timely manner to avoid a conflict with the statute of limitations. The Compliance Manager and the Regional Director will review the report of all active case files on a weekly basis.

Significant and contested cases shall be thoroughly reviewed by the appropriate Program Director. The Regional Director will ensure that all deficiencies are corrected by the CSHO before forwarding the case file to the Director of the Office of Legal Support and then to the Program Director for review.

If at any point in the significant case review process in the central office it is determined that additional investigation or documentation is needed to substantiate the case findings or conclusions, the file will be sent back at that time to the Regional Director for action.

If a change in wording or organization of the case file is recommended by a reviewer, the case file will continue to go forward in the significant case review process. The reviewer will note the recommendations for change on the routing/review sheet. The Compliance Manager or Lead Inspector in his absence will implement all changes after the review is completed.

All significant cases will be tracked by the Office of Legal Support and Regional Offices.

(See information concerning the significant case review process and procedures including VOSH Program Directive 01-004 or its successor.)

o. **Media Contacts.** All media requests shall be referred to the VOSH Media Contact Person.

A. 2. Guidelines/ Filling Out Forms.

a. Case File Narrative. The ability to communicate accurate and complete information in writing is the single most important tool that the Safety and Health Compliance Officer (CSHO) uses. Conducting a thorough investigation by utilizing good interview techniques, gathering all pertinent facts and data, and properly analyzing the data is only as good as the CSHO's ability to relate that information to others in writing.

Keep in mind that the report and case file will be used by many others in making final decisions regarding the case. A clear and complete report will pass through the chain of command swiftly since valuable time will not be wasted attempting to find answers to questions not answered in the written report.

It is also important to be aware that in the event of litigation, all written materials related to the written report and case file are "discoverable" and must be provided to the employer's attorney or any interested party to the case. Failure to include only factual and documented evidence in the file could result in loss of the court case.

Finally, the case may be the subject of an FOIA request to public disclosure.

b. Preparation. During the Inspection/ Investigation, the CSHO is continuously gathering evidence and documents that will be incorporated in the case file, including:

Photographs
Sketches/diagrams of accident scene
Witness statements
Employee statements
Autopsy reports
Sampling/test results
Involved personnel job descriptions
Employer training or safety manual
Pertinent management policies and procedures
Equipment specifications
Equipment purchase, repair or maintenance records
Checklists/worksheets completed by CSHO
Other pertinent documents.

(See chapters regarding Inspection/ Investigation Procedures)

As this documentation is collected, it should be assembled for easy access and future use. The case diary log will provide a concise and chronological account of all contacts and actions taken from the beginning to the end of the Inspection/ Investigation.

Prior to writing the narrative, the CSHO should review all the documents and evidence gathered to ensure that there are no "holes" or unanswered questions concerning the findings and conclusions of the investigation, or any material aspect of it.

The written narrative report is then prepared to present a written summary of the case findings, conclusions, and recommendations. As such, it must contain complete thoughts, complete names and complete descriptions of events.

When writing the report, the CSHO should assume that the reader knows absolutely nothing about the incident, the people involved, or the investigation. As mentioned above, but cannot be over-emphasized, **the summary report must answer the six basic questions of Who, What, When, Where, Why and How.** Documentation must be contained in the file to support the answers to these basic questions.

A.2. c. Content and Style. The written narrative report is not an essay. Only relevant, pertinent and essential information should be included in the narrative report.

The narrative will not duplicate the detailed information contained in witness statements or other auxiliary reports, but will serve to summarize the pertinent findings and conclusions drawn from these documents. The narrative will reference the attached documents, which will be tabbed. The reader will thus be able to refer easily to each attached document for more detailed information. The narrative will be:

FACTUAL - documented, true information; not opinion;

ACCURATE - exact and correct;

LOGICAL - sensible, chronological and sequential order;

CLEAR - easy to understand; no jargon or slang;

CONCISE - as few words as possible; brief and to the point;

COMPLETE - who, what, when, where, why and how addressed;

NEAT - written legibly, or typed;

STRUCTURED PROPERLY-proper grammar, sentence structure, paragraphing and punctuation.

A.2. d. Format. To ensure that all narratives are written in a consistent, complete and accurate manner, the following format will be utilized by all staff. All narratives will consist of three (3) major sections:

BACKGROUND

FINDINGS OF FACT

CONCLUSIONS/ RECOMMENDATIONS

(1) The **BACKGROUND** section will contain the following subsections:

(a) **PURPOSE** - A statement of why the inspection or investigation was initiated. Initiation may have resulted from a complaint, a referral, an accident or a programmed inspection. If an accident occurred, this section should state the time and date of the accident and should include the name of the person who reported the accident, and the time the report was received. If a complaint was involved, the CSHO shall provide a short summary of the complaint and state the date the compliant was received.

(b) **WORKSITE DESCRIPTION** - a brief description of the worksite inspected. Photos of the worksite may be referenced as an exhibit, if appropriate.

(c) **INSPECTION HISTORY** - A summary of the number of inspections conducted with this company statewide during the last three years, including the number of citations issued. An exhibit with a detailed breakdown of these inspections shall be included in the file if multiple inspections were conducted or if numerous citations were involved.

A.2.d.(1)

(d) **CONDUCT OF THE INSPECTION** - A short description of the opening conference, walkaround and closing conference. Specific details should be contained in exhibits and referenced in the narrative.

(2) The **FINDINGS OF FACT** section should contain all relevant facts and findings of the Inspection/ Investigation and include the following subsections in the case of accident or fatality investigations:

(a) Findings of Fact pertaining to the accident or fatality;

(b) Findings of Fact unrelated to the accident or fatality;

Each factual finding shall be detailed in a separate paragraph. Documentation to support these findings (i.e., photos, summary of witness statements without names, etc.) shall be tabbed, attached and referenced in the paragraph. Data should not be repeated; unnecessary adjectives should not be used.

Never make assumptions. Opinions should be omitted. The facts should be stated simply and clearly. The facts should be listed ... A, B, C, and should be arranged in a logical order, explaining the findings of the investigation from beginning to end. List all pertinent findings related to the Inspection/ Investigation.

This section of the narrative must identify all the documented findings that support the CSHO's conclusions and recommendations. This section will summarize the evidence that will be used by the Commissioner in issuing a final order and may later be used by the Commonwealth's Attorney in trial if the Commissioner's Order is contested.

(3) The **CONCLUSION/ RECOMMENDATIONS** section lists all violations determined by the Inspection/ Investigation; violations will be identified as Willful, Serious, or Other; references supporting or documenting the violation will be included, and the proposed penalty for each violation will be stated.

A.2. e. Other Requirements.

(1) All "significant case" narratives shall be typed. Non-significant case narratives may be hand written in a legible fashion.

(2) Each case narrative will be written, and each case file shall be organized, in accordance with this manual prior to submission of the file to management for the significant review process.

f. Sample Narrative. Examples of proper VOSH Inspection/ Investigation narratives are located in the Appendix.

B. Violations

1. Basis of Violations.

a. Standards and Regulations.

Section 40.1-51.1, *Code of Virginia,* states that each employer has a responsibility to comply with the occupational safety and health standards promulgated under § 40.1-22, *Code of Virginia*. The standards which are the basis of violations are subdivided as follows:

Part 1910	Standards for General Industry
Part 1915	Shipyard Employment (Public Sector only)
Part 1917	Maritime Standards (Public Sector only)
Part 1918	Longshoring (Public Sector only)
Part 1926	Standards for Construction
Part 1928	Standards for Agriculture

NOTE: *The most specific portion of the standard shall be used for citing violations.*

(1) Definition of Horizontal/Vertical Standards and General/Specific Standards.

(a) Vertical standards are those standards which apply to a particular industry or to particular operations, practices, conditions, processes, means, methods, equipment or installations.

B.1.a.(1)

(b) **Horizontal standards** are those standards which apply when a condition is not covered by a vertical standard.

(c) Within *both* horizontal and vertical standards there are *general* standards and *specific* standards.

1 **General standards** are those which address a category of hazards and whose coverage is not limited to a special set of circumstances. e.g., §§ 1910.132(a), 1910.212(a)(1), or (a)(3)(ii), 1910.307(b) and 1926.28(a).

2 **Specific standards** are those which are designed to regulate a specific hazard and which set forth the measures that the employer must take to protect employees from that particular hazard; e.g., §§ 1910.23(a)(1), and 1926.451(d)(10).

(2) **Application of Standards.** If a CSHO is uncertain whether to cite under a horizontal or a vertical standard when both apply, the Compliance Manager shall be consulted. The following general guidelines apply:

(b) **Vertical Takes Precedence.** When a hazard in a particular industry is covered by both a vertical standard and a horizontal standard, the vertical standard shall usually take precedence. This is true even if the horizontal standard is more stringent.

NOTE: *When the language in a vertical standard **specifically refers to** a horizontal standard (i.e., "in accordance with § 1910.xxxx " or "general safety and health standards to prevail where applicable"), the horizontal standard shall be cited, with a reference in the case file to the vertical standard.*

(b) **Analysis When Horizontal Standard is More Specific Than Vertical Standard.** In situations covered by both a horizontal and a vertical standard where the horizontal standard appears to offer greater protection, the horizontal standard may be cited only if its requirements are not inconsistent with or in conflict with the requirements of the

vertical standard. To determine whether there is a conflict or inconsistency between the standards, a careful analysis of the intent of the two standards must be performed.

B.1.a.(2)

(c) When there is No Vertical Standard. If the particular industry does not have a vertical standard that covers the hazard, then the CSHO shall use the horizontal (general industry) standard.

Exception: Only those parts of § 1910 which are *specifically referenced* in § 1928 (Safety Standards for Agriculture) apply to agriculture.

(d) Specific Horizontal Takes Precedence over General Horizontal. When a hazard covered by horizontal standards is covered by both a more general standard and a more specific standard, the more specific standard usually takes precedence. For example, in § 1910.213(g) the requirement for point of operation guarding for swing cutoff saws is more specific than and takes precedence over the general machine guarding requirements contained in § 1910.212(a)(3)(ii).

(e) Nature of Activity vs. Nature of General Business. When determining whether a horizontal or a vertical standard is applicable to a work situation, the CSHO shall focus attention on the activity in which the employer is engaged at the establishment being inspected rather than the nature of the employer's general business.

For example, violations in the heavy equipment maintenance and repair garage of a construction contractor would be focused on § 1910 standards rather than § 1926 standards.

(3) Variance From Standard. The employer's requirement to comply with a standard may be modified through granting of a variance, as outlined in § 190 of the VOSH Administrative Regulations Manual.

B.1.a.(3)

(a) **Compliance with Granted Variance or Controlling Standard.** An employer will not be subject to citation if the observed condition is in compliance with either the granted variance or the controlling standard. In the event that the employer is not in compliance with the requirements of the variance, a violation of the standard shall be cited with a reference in the citation to the variance provision that has not been met.

(b) **Variance Application in Process During Apparent Violation.** If, during the course of a compliance inspection, the CSHO discovers that the employer has filed an application for variance regarding a condition which is determined to be an apparent violation of the standard, this fact shall be reported to the Compliance Manager who shall obtain information concerning the status of the variance request.

(c) **Variance Granted by Federal OSHA.** If a variance was granted to the employer by Federal OSHA, the Compliance Manager will consult with the Office of Legal Support Director to determine if the variance has been honored by VOSH. If the variance has not been honored and the observed condition is not in compliance with the controlling standard, a violation will be issued.

(4) **Interpretation of Standards.** Employers, employees and their representatives may request standards interpretations from VOSH.

(a) All requests for interpretations of standards shall be referred to the appropriate Program Director depending upon the standard. Draft interpretations will be developed by the Program Director and circulated for concurrence to the other division directors, as appropriate.

(b) The Program Director shall e-mail a copy of the interpretation to each Compliance Manager and Regional Director to be filed with the appropriate program directive or standard.

B.1. **b. Employee Exposure.** An employer in apparent violation of a VOSH standard or the general duty clause shall be cited only when employee exposure can be documented and substantiated. The exposure must have occurred within the six (6) months directly before the issuance of the citation in order to serve as a basis for the violations. Note the differences in how the six months is tracked.

No citation may be issued after the expiration of six months following a compliance inspection, investigation, or survey revealing any such violation. See section B.5.a. of this Chapter, *Writing Citations*, for VOSH's interpretation of the statute.

(1) Definition of Employee and Employer. Whether exposed persons are employees of an employer depends on several factors, the most important of which is who controls the manner in which the employees perform their assigned work. The question of who pays these employees may not be the determining factor.

Determining the employer of an exposed person may be a very complex question. If there is difficulty in determining the employer of an exposed person, the Compliance Manager shall contact the Program Director who shall seek the advice of the Office of Legal Support Director.

(2) Proximity to the Hazard. The proximity of the workers to the point of danger of the operation shall be documented.

(3) Observed Exposure. Employee exposure is established if the CSHO witnesses, observes or monitors exposure of an employee to the hazardous condition. Although the use of adequate personal protective equipment does not alter the external conditions of employee exposure, such exposure may be cited only where the standard requires engineering, or administrative (including work practice) controls.

(4) Unobserved Exposure. Where employee exposure is not observed, witnessed, or monitored by the CSHO, employee exposure is established if it is determined through witness statements or other evidence that exposure to a hazardous condition has occurred, or continues to occur.

(a) In fatality/catastrophe (or other "accident") investigations, employee exposure is established if the CSHO determines, through written statements or other evidence, that exposure to a hazardous condition occurred at the time of the accident.

(b) In other circumstances, based on the CSHO's professional judgment and determination, if exposure to hazardous conditions has occurred in the past, such exposure may serve as the basis for a violation when employee exposure has occurred in the previous six months.

(5) Potential Exposure. A citation may be issued when the possibility exists that an employee could be exposed to a hazardous condition because of work patterns, past circumstances, or anticipated work requirements, and it is reasonable to expect that employee exposure could occur, such as:

(a) The hazardous condition is an integral part of an employer's recurring operations, but the employer has not established a policy or program that would prevent employee exposure, including accidental exposure from reoccurring, or

(b) The employer has not taken steps to prevent access to unsafe machinery or equipment which employees may have reason to use; or

(c) A safety or health hazard poses a danger to employees simply by employee presence in the area and it is reasonable to expect that an employee could come into the area during the course of the work, to rest or to eat at the job site, or to enter or to exit from the assigned workplace.

(6) Documenting Employee Exposure. The CSHO shall fully document exposure for every apparent violation. This includes such items as:

(a) Comments by the exposed employees, the employer (particularly the immediate supervisor of the exposed employee), other witnesses (especially other employees or members of the exposed employee's family);

(b) Signed statements from employees and supervisory personnel;

(c) Photographs and/or video tapes; and

(d) Documents (e.g., autopsy reports, police reports, job specifications, etc.).

(e) Diagrams and graphic representations.

c. Regulatory Requirements. Violations of § 40 of the Administrative Regulations Manual shall be documented and cited when the employer does not comply with the posting requirements, the recordkeeping requirements or the reporting requirements of the regulations manual contained in this section.

NOTE: If the Regional Director(s) becomes aware of an incident required to be reported under § 40.1-51.1.D. or § 50 of the Administrative Regulations Manual through some means other than an employer report prior to the end of the 8-hour reporting period, and if an inspection of the incident is made, a violation for failure to report does not exist.

d. Hazard Communication. Section 1910.1200 applies to manufacturers and importers of hazardous chemicals even though they themselves may not have employees exposed. Consequently, any violations of that standard by manufacturers or importers shall be documented and cited, irrespective of employee exposure at the manufacturing or importing location. (See VOSH Program Directive 02-060A, or its successor.)

2. Types of Violations.

a. Other-than-Serious Violations. This type of violation, defined in regulation as "Other Violation" in § 10 of the ARM, shall be cited in situations where the most serious injury or illness that would be likely to result from a hazardous condition cannot reasonably be predicted to cause death or serious physical harm to exposed employees but does have a direct and immediate relationship to their safety and health.

B.2. b. Serious Violations.

(1) Statutory Provision. Section 40.1-49.3., *Code of Virginia*, provides " . . . a serious violation shall be deemed to exist in a workplace if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such workplace, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."

(2) Four Elements of Serious Violation. The CSHO shall consider four elements to determine if a violation is serious. The four-step analysis below is necessary to make the determination that an apparent violation is properly classified as "serious", that is, whether there is a substantial probability that death or serious physical harm could result from an accident or exposure relating to the violative condition. Apparent violations of the **general duty clause** shall also be serious violations.

The **probability** that death or serious physical harm could result from an accident or illness will occur **is not to be considered** in determining whether a violation is serious.

The violation classification need not be completed for **each instance**; only once for each full item, or, if items are grouped, once for the group.

If the full item consists of **multiple instances** or grouped items, the classification shall be based on the most serious item.

If more than one type of accident or health hazard exposure exists which the standard is designed to prevent, the CSHO shall determine which type could reasonably be expected to result in the most severe injury or illness and shall base the classification of the violation on that determination.

(a) Step 1, Type of Accident or Exposure. The CSHO shall consider the types of accident or health hazard exposure which the violated standard or the general duty provision is designed to prevent. The CSHO need not establish the exact way in which an accident, or health hazard exposure would

occur. The exposure or potential
exposure of an employee is sufficient to establish that an accident or health hazard exposure could occur. However, the CSHO shall note the facts which could affect the severity of the injury or illness resulting from the accident or health hazard exposure.

B.2.b.(2) (b) **Step 2, Most Serious Injury or Illness.** The CSHO shall determine the most serious injury or illness which could reasonably be expected to result from the type of accident or health hazard exposure identified in Step 1. The CSHO shall not give consideration at this point to factors which relate to the probability that an injury or illness will occur.

For conditions involving exposure to air contaminants or harmful physical agents, the CSHO shall consider the concentration levels of the contaminant or physical agent in determining the types of illness which could reasonably result from the condition. The Chemical Information table found in Appendix A of the IH Technical Manual shall be used to determine toxicological properties of substances listed as well as a Health Code Number. A preliminary violation classification shall be assigned in accordance with the instructions given in sections on violations.

In order to support a preliminary classification of serious, VOSH must establish a *prima facie* case that exposure at the sampled level would, if representative of conditions to which employees are normally exposed, lead to illness.

The CSHO must make every reasonable attempt to show that the sampled exposure is in fact representative of employee exposure under normal working conditions.

The CSHO shall, therefore, identify and record all available evidence which indicates the frequency and duration of employee exposure. Such evidence would include:

1 The nature of the operation from which the exposure results;

B.2.b.(2)(b) **2** Whether the exposure is regular and on-going or of

limited frequency and duration;

3 How long employees have worked at the operation in the past:

4 Whether employees are performing functions which are expected to continue;

5 Whether work practices, engineering controls, production levels and other operating parameters are typical or normal operations;

Where such evidence is difficult to obtain or where it is inconclusive, the CSHO shall estimate the frequency and duration from the evidence available. If the evidence indicates that it is reasonable to predict that regular, ongoing exposure could occur, the CSHO shall presume such exposure in determining the types of illnesses which could result from the violating condition.

(c) Step 3, Death or Serious Physical Harm. The CSHO shall determine whether the results of the injury or illness identified in Step 2 could include death or serious physical harm.

1 Serious physical harm is defined as impairment of the body in which part of the body is made **functionally useless** or is **substantially reduced in efficiency** on or off the job. Such impairment may be permanent or temporary, chronic or acute. Injuries involving such impairment would usually require treatment by a medical doctor.

2 Serious physical harm can also be an illness that could shorten life or significantly reduce physical or mental efficiency by inhibiting the normal function of a part of the body.

B.2.b.(2)

(d) **Step 4, Employer Knowledge.** The CSHO shall determine whether the employer knew or with the exercise of reasonable diligence, could have known of the presence of the hazardous condition.

1 The knowledge requirement is met if it is determined that the employer actually knew of the hazardous condition which constituted the apparent violation. In this regard, a supervisor represents the employer and a supervisor's knowledge of the hazardous condition amounts to employer knowledge.

2 In cases where the employer may contend that a supervisor's own conduct constitutes an isolated event of employee misconduct, the CSHO shall attempt to determine the extent to which a supervisor was trained and supervised so as to prevent such conduct, and how the employer enforces the rule.

3 If, after reasonable attempts to do so, it cannot be determined that the employer has actual knowledge of the hazardous condition, the knowledge requirement is met if the CSHO is satisfied that the employer could have known through the exercise of reasonable diligence.

As a general rule, if the CSHO was able to discover a hazardous condition in nature, it can be presumed that the employer could have discovered the same condition through the exercise of reasonable diligence As a general rule, if the CSHO was able to discover a hazardous condition, and the condition was not transitory in nature, it can be presumed that the employer could have discovered the same condition through the exercise of reasonable diligence.

B.2. **c. General Duty Requirements.** Section 40.1-51.1.A, *Code of Virginia,* requires that "It shall be the duty of every employer to furnish to each of his employees safe employment and a place of employment which is freefrom recognized hazards that are likely to cause death or serious physical harm to his employees, ..." This shall only be used when there is no specific standard which is applicable to the recognized hazard.

(1) Evaluation of Potential (§ 40.1-51.1.A.) Situations. Legal precedent has established that the following elements are necessary to prove a violation of the general duty clause:

(a) The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;

(b) The hazard was recognized;

(c) The hazard was causing or was likely to cause death or serious physical harm; and

(d) There was a feasible and useful method to correct the hazard.

(2) Discussion of General Duty Elements (§ 40.1-51.1A.). The above four elements of a general duty standard violation are discussed in greater detail as follows:

(a) A Hazard to Which Employees Were Exposed. A general duty citation must involve both a serious hazard and exposure of employees.

1 Hazard. A hazard is a danger which threatens physical harm to employees.

a Not the Lack of a Particular Abatement Method. In the past, some general duty (§ 40.1-51.1.A.) citations have incorrectly alleged that the violation is the failure to implement certain precautions, corrective measures or other abatement steps rather than the failure to prevent or remove the particular hazard. It must be emphasized that general duty violations do not mandate a particular abatement measure but only require an

employer to render the work place free of certain hazards by any feasible and effective means which the employer wishes to utilize. In situations where it is difficult to distinguish between a dangerous condition and the lack of an abatement method, the CSHO shall consult with the Compliance Manager for assistance in articulating the hazard properly.

* Where it is difficult to distinguish between a dangerous condition and the lack of an abatement method, the Compliance Manager shall consult with the Program Director for assistance in describing the hazard properly.

EXAMPLE 1. Employees doing sanding operations may be exposed to the hazard of fire caused by sparking in the presence of magnesium dust. One of the abatement methods may be training and supervision. The "hazard" is the exposure to the potential of a fire; it is not the lack of training and supervision.

EXAMPLE 2. A danger of explosion due to the presence of certain gases could be abated by the use of non-sparking tools. The hazard is the explosion danger due to the presence of the gases; it is not the lack of non-sparking tools.

EXAMPLE 3. In a hazardous situation involving high pressure gas where the employer has not trained his employees properly, has not installed the proper high pressure equipment, or has improperly installed the equipment that is in place, there

are three abatement measures which the employer failed to take; there is only one hazard (for example, exposure to the hazard of explosion due to the presence of high pressure gas)and hence, only one general duty clause citation.

* Where necessary, the Program Director shall consult with the Office of Legal Support Director.

B.2.c.(2)(a)1

b The Hazard Is Not a Particular Accident. The occurrence of an accident does not necessarily mean that the employer has violated the general duty clause although the accident may be evidence of a hazard. In some cases, a general duty violation may be unrelated to the accident. Although accident facts may be relevant and shall be gathered, the citation shall address the hazard in the workplace, not the particular facts of the accident.

c The Hazard Must Be Reasonably Foreseeable. The hazard for which a citation is issued must be reasonably foreseeable.

i. All the factors which could cause a hazard need not be present in the same place at the same time in order to prove foresee ability of the hazard; e.g., an explosion need not be imminent.

EXAMPLE: If a danger of explosion due to the presence of certain gases exists in one area of a plant, but non-sparking tools are used in that area, no

§ 40.1-51.1.A. violation would exist. If sparking tools are used in other areas of the plant and the employer has not taken sufficient safety precautions to preclude their use in the area in which non-sparking tools should be used, then a foreseeable hazard may exist.

B.2.c.(2)(a)1c

ii. It is necessary to establish the reasonable foreseeability of the general workplace hazard, rather than the particular hazard which led to the accident.

EXAMPLE: A titanium dust fire may have spread from one room to another only because an open can of gasoline was in the second room. An employee who usually worked in both rooms was burned in the second room from the gasoline. The presence of gasoline in the second room may be a rare occurrence. It is not necessary to prove that a fire in both rooms was reasonably foreseeable. It is necessary only to prove that the fire hazard, in this case, due to the presence of titanium dust, was reasonably foreseeable.

2 The Hazard Must Affect the Cited Employer's Employees. The employees exposed to the hazard for which a general duty violation is cited (§ 40.1-51.1.A. hazard) must be the employees of the cited employer.

B.2.c.(2)(a)2

a An employer, under the General Duty Clause, is only cited for hazard exposure of his own employees. Therefore, an employer who may have created and/or controlled the hazard shall not be cited for a violation of § 40.1-51.1(2), unless its own employees are exposed to the hazard.

b In complex situations such as multi-employer worksites where it may be difficult to identify the precise employment relationship between the employer to be cited and the exposed employees, the Regional Manager shall consult with the Office of Legal Support to determine the sufficiency of the evidence regarding the employment relationship.

c Whether exposed persons are employees of an employer depends on several factors, the most important of which is who controls the manner in which the employees perform their assigned work. The question of who pays these employees may not be the determining factor. The fact that an employer denies that exposed employees are his employees does not necessarily decide the legal issue involved.

(b) **The Hazard Must Be Recognized.** Recognition of a hazard can be established on the basis of industry recognition, employer recognition, or "common-sense" recognition. The use of common-sense as the basis for establishing recognition shall be limited to special circumstances. Recognition of the hazard must be supported by satisfactory evidence and adequate documentation in the file as follows:

B.2.c.(2)(b)

1 **Industry Recognition.** A hazard is recognized if the employer's industry recognizes it. Recognition by an industry other than the industry to which the

employer belongs is generally insufficient to prove this element of a general duty standard violation. Although evidence of recognition by the employer's specific branch within an industry is preferred, evidence that the employer's industry recognizes the hazard may be sufficient. The CSHO shall consult with the Compliance Manager on this issue. Industry recognition of a particular hazard can be established in several ways:

a Statements by industry safety or health experts which are relevant to the hazard.

b Evidence of implementation of abatement methods to deal with the particular hazard by other members of the industry.

c Manufacturer's warnings on equipment which are relevant to the hazard.

d Statistical or empirical studies conducted by the employer's industry which demonstrate awareness of the hazard. Evidence such as studies conducted by the employee representatives, the union or other employees should also be considered if the employer or the industry has been made aware of them.

e Government and insurance industry studies, if the employer or the employer's industry is familiar with the studies and recognizes their validity.

B.2.c.(2)(b)1

f State and local laws or regulations which apply in the jurisdiction in which the violation is alleged to have occurred and which currently are enforced against the industry in question. In such cases, however, corroborating evidence of recognition is recommended.

Regulations of Federal agencies other than OSHA or of State atomic energy agencies generally shall not be used. They raise substantial difficulties under Section 4(b)(1) of the OSH Act, which provides that VOSH is preempted when such an agency has statutory authority to dealt with the working condition in question.

In cases where state and local government agencies have codes or regulations covering hazards not addressed by VOSH standards, the Office of Legal Support Director shall determine whether the hazard is to be cited under a § 40.1-51.1.A general duty violation or referred to the appropriate local agency for enforcement.

EXAMPLE: A safety hazard on a personnel elevator in a factory may be documented during an inspection. It is determined that the hazard is not clearly covered under § 40.1-51.1.A., but there is a local code which addresses this hazard and a local agency actively enforces the code. The situation shall normally be referred to the local enforcement agency in lieu of citing § 40.1-51.1.A.

g Standards issued by the American National Standards Institute (ANSI), the National Fire Protection Agency (NFPA), and other private standard-setting organizations, if the relevant industry participated on the committee drafting the standards. Otherwise, such private standards shall normally be used only as corroborating evidence of recognition. Preambles to these standards which discuss the hazards involved may show hazard recognition as much as, or more than, the actual standards. It must be emphasized, however, that these private standards cannot be enforced like VOSH standards. They are simply evidence of industry recognition, seriousness of the hazard or feasibility of abatement methods.

h NIOSH criteria documents; the publications of EPA, the National Cancer Institute, and other agencies; OSHA hazard alerts; the IHFOM; and articles in medical or scientific journals by persons other than those in the industry, if used only to supplement other evidence which more clearly establishes recognition. Such publications can be relied upon only if it is established that they have been widely distributed in general, or in the relevant industry.

2 **Employer Recognition.** A recognized hazard can be established by evidence of actual employer knowledge. Evidence of such recognition may consist of written or oral statements made by the employer or other management or supervisory personnel during or before the VOSH inspection, or instances where employees have clearly called the hazard to the employer's attention.

a Company memoranda, safety rules, operating manuals or operating procedures, and collective bargaining agreements may reveal the employer's awareness of the hazard. In addition, accident, injury and illness reports prepared for VOSH or OSHA, Worker's Compensation, or other purposes, Industrial Insurance, or other purposes, may show this knowledge.

b Employee complaints or grievances to supervisory personnel may establish recognition of the hazard, but the evidence should show that the complaints were not merely infrequent, off-hand comments.

c The employer's own corrective action may serve as the basis for establishing employer recognition of the hazard if the employer did not adequately continue or maintain the corrective action or if the corrective action did not afford any significant protection to the employees.

3 **Common-Sense Recognition.** If industry or employer recognition of the hazard cannot be established in accordance with 1 and 2, recognition can still be established if it is concluded that any reasonable person would have recognized the hazard. This theory of recognition shall be used only in flagrant cases.

EXAMPLE: In a general industry situation, a court has held that any reasonable person would recognize that it is hazardous to dump bricks from an unenclosed chute into an alleyway between buildings which is 26 feet below and in which unwarned employees work. (In construction, the general duty violation could not be cited in this situation because § 1926.252 or § 1926.852 applies.)

B.2.c.(2)

(c) **The Hazard Was Causing or Was Likely to Cause Death or Serious Physical Harm.** This element of a general duty standard violation is identical to the elements of a serious violation. Serious physical harm is defined in this chapter. This element of a general duty standard violation (§ 40.1-51.1.A. hazard) can be established by showing that:

1 An actual death or serious injury resulted from the recognized hazard, whether immediately prior to the inspection or at other times and places; or

2 If an accident occurred, the likely result would be death or serious physical harm. For example, an employee is standing at the edge of an unguarded piece of equipment 25 feet above ground. Under these circumstances, if the falling incident occurs, death or serious physical harm (i.e., broken bones), is likely.

3 In a health context, establishing serious physical harm at the cited levels may be particularly difficult if the illness will require the passage of a substantial period of time to occur. Expert testimony is crucial to establish that serious physical harm will occur for such illnesses. It will generally be easier to establish this element for acute illnesses, since the immediacy of the effects will make the causal relationship clearer. To establish that the hazard causes or is likely to cause death or serious physical harm when such illness or death will occur only after the passage of a substantial period of time, the following must be shown:

a Regular and continuing employee exposure at the workplace to the toxic substance at the measured levels reasonably could occur;

b Illness reasonably could result from such regular and continuing employee exposure; and

c If illness does occur, its likely result is death or serious physical harm.

(d) The Hazard Can Be Corrected by a Feasible and Useful Method.

1 To establish a general duty violation the Department must identify a method which is feasible, available and likely to correct the hazard. The information shall indicate that the recognized hazard, rather than a particular accident, is preventable.

2 If the proposed abatement method would eliminate or significantly reduce the hazard beyond whatever measures the employer may be taking, a duty general citation may be issued. A citation shall not be issued merely because the Department knows of an abatement method different from that of the employer, if the Department's method would not reduce the hazard significantly more than the employer's method. It must also be noted that in some cases only a series of abatement methods will alleviate a hazard. In such a case all the abatement methods shall be mentioned.

3 Feasible and useful abatement methods can be established by reference to:

a The employer's own abatement method which existed prior to the inspection but was not implemented;

b The implementation of feasible abatement measures by the employer after the accident or inspection;

c The implementation of abatement measures by other companies;

d The recommendations by the manufacturer of the hazardous equipment involved in the case; and

e Suggested abatement methods contained in trade journals, private standards and individual employer standards. Private standards shall not be relied on in a general duty citation as mandating specific abatement methods.

* For example, if an ANSI standard deals with the hazard of exposure to hydrogen sulfide gas and refers to various abatement methods, such as the prevention of the buildup of materials which create the gas and the provision of ventilation, the ANSI standard may be used as evidence of the existence of feasible abatement measures.

* The citation for the example given shall state that the recognized hazard of exposure to hydrogen sulfide gas was present in the workplace and that a feasible and useful abatement method existed; e.g., preventing the buildup of gas by providing an adequate ventilation system. It would not be correct to issue a citation alleging that the employer failed to prevent the buildup of materials which could create the gas and failed to provide a ventilation system as both of these are abatement methods, not hazards.

f Evidence provided by expert witnesses which demonstrates the feasibility of the abatement methods. Although it is not necessary to establish that the industry recognizes a particular abatement method, such evidence shall be used if available.

B.2.c. (3) **Limitations on Use of a General Duty Clause.** The General Duty Clause may be applied in situations where a recognized hazard is created in whole or in part by conditions not covered by a standard.

The General Duty Clause may be applicable to some types of employment which are inherently dangerous (fire brigades, emergency rescue operations, etc.). Employers involved in such occupations must take the necessary steps to eliminate or minimize employee exposure to all recognized hazards which are likely to cause death or serious physical harm. These steps include anticipating hazards which may be encountered, providing appropriate protective equipment, and providing training, instruction, and necessary equipment. An employer who has not taken appropriate steps on any of these or similar items and has allowed the hazard to continue to exist may be cited under the general duty clause (if not covered under a standard).

(a) **General Duty Clause, § 40.1-51.1.A., Shall Not Be Used When an Alternate Standard Applies.** Legal precedent establishes that general duty violations may not be used if a VOSH standard applies to the hazardous working condition.

1 **Review of Existing Standards.** Prior to issuing a general duty citation, VOSH standards must be reviewed carefully to determine whether a standard applies to the hazard. If a standard applies, the standard shall be cited rather than general duty. Prior to the issuance of a general duty standard citation, a notation shall be made in the file to indicate that the standards were reviewed and no other standard applies.

2 **Consultation.** If there is a question as to whether another standard applies, the CSHO shall consult with the Compliance Manager.

3 **When to Cite General Duty, in the Alternative.** General duty may be cited in the alternative when a standard is also cited to cover a situation where there is doubt as to whether the standard applies to the hazard. Before citing in the alternative, the Compliance Manager shall consult with the

appropriate Program Director and the Office of Legal Support.

B.2.c.(3)(a)3

a If, in a subsequent informal conference or notice of contest proceeding, an employer questions whether the specific standard, cited in the alternative, applies to the situation, the Compliance Manager shall consult with the Regional Director. The Director shall refer the matter to the Office of Legal Support Director and the Assistant Attorney General for appropriate legal advice.

b When the employer raises the issue of the preemption of the general duty clause by the cited standard in a subsequent informal conference or notice of contest proceeding, the Compliance Manager shall follow the same procedure as above.

(b) Grouping. General duty standard violations shall *not* generally be grouped together, but *may* be grouped with a related violation of a specific standard.

(c) Strictness of Standard. General duty § 40.1-51.1.A. shall not normally be used to impose a stricter requirement than that required by the other standard. For example, if the standard provides for a permissible exposure limit (PEL) of 5 ppm, even if data establishes that a 3 ppm level is a recognized hazard, general duty violation shall not be cited to require that the 3 ppm level be achieved unless the limits are based on different health effects. If the standard has only a time-weighted average permissible exposure level and the hazard involves exposure above a recognized ceiling level, the CSHO shall consult with the Compliance Manager, who shall discuss any proposed citation with the Regional Director, Program Director and the Office of Legal Support.

NOTE: *An exception to this rule may apply if it can be documented that "an employer knows a particular safety or health standard is inadequate to protect his workers against the specific hazard it is intended to address." International Union, U.A.W. v. General Dynamics Land Systems Div., 815 F.2d 1570 (D.C. Cir. 1987). Such cases shall be subject to pre-citation review.*

B.2.c.(3)

(d) Abatement Methods. General duty violations shall normally not be used to require an abatement method not set forth in a specific standard. If a toxic substance standard covers engineering control requirements but not requirements for medical surveillance, general duty, or § 40.1-51.1.A. shall not be cited to require medical surveillance.

(e) "Should" Standards. General duty violations § 40.1-51.1.A. shall not be used to enforce "should" standards. If a reference standard or its predecessor, such as an ANSI standard, uses the word "should," neither the standard nor safe place shall ordinarily be cited with respect to the hazard addressed by the "should" portion of the standard.

(f) Hazards Exempted by a Standard. Section 40.1-51.1.A. shall not normally be used to cover categories of hazards exempted by a standard. If, however, the exemption is in place because the drafters of the standard (or source document) declined to deal with the exempt category for reasons other than the lack of a hazard, a general duty standard may be cited if all the necessary elements for such a citation are present.

(g) Citing a General Standard, or alternative standard. There are a number of general standards which shall be considered for citation rather than the General Duty clause, or § 40.1-51.1.A., in certain situations which initially may not appear to be governed by a standard.

1 If a hazard not covered by a specific standard can be substantially corrected by compliance with a personal protective equipment (PPE) standard, the PPE standard shall be cited. In general industry, § 1910.132(a) may be appropriate where exposure to a

hazard may be prevented by the wearing of PPE. In construction, § 1926.28(a) may be applicable.

B.2.c.(3)(g)

2 For a health hazard, the particular toxic substance standards, such as asbestos and coke oven emission, shall be cited where appropriate. If those particular standards do not apply, however, other standards may be applicable; e.g., the air contaminant levels contained in § 1910.1000 may apply in general industry and § 1926.55 may apply in construction.

3 Another standard which may possibly be cited is § 1910.134(a) which deals with the hazards of breathing harmful air contaminants not covered under § 1910.1000 or another specific standard.

4 In addition, § 1910.14(g)(2) may be cited when employees are allowed to consume food or beverages in an area exposed to a toxic material, and § 1910.132(a) may be cited when toxic materials are absorbed through the skin.

5 The foregoing standards as well as others which may be applicable shall be considered carefully before issuing a general § 40.1-51.1.A. citation for a health hazard.

(h) Pre-Citation Review. The Compliance Manager shall ensure that all proposed § 40.1-51.1.A. citations undergo pre-citation review as follows:

1 The Compliance Manager shall review the case file prior to the issuance of all § 40.1-51.1.A. citations to ensure that all elements required in this chapter are included and that the case file is complete. The Compliance Manager shall also review the file and forward it to the Program Director for a decision on whether to issue the citation. The Office of Legal Support will review the case to ensure that it is legally supportable.

2 If a standard does not apply and all criteria for issuing a § 40.1-51.1.A. citation are not met but the Compliance Manager determines that the hazard justifies some type of notification, a letter describing the hazard and suggesting corrective action shall be sent to the employer and the employee representative.

(i) **Classification of General Duty, Violations.** Only those hazards alleging *serious* violations may be cited under a general duty standard (including willful and/or repeated violations which would otherwise qualify as serious violations, except for their willful or repeated nature).

(j) **Justification of General Duty Citations.** To ensure that all citations of a general duty standard are fully justified, the evidence necessary to establish each element of a general duty violation shall be documented in the file. This includes all photographs, videotapes, sampling data, witness statements and other documentary and physical evidence necessary to establish the violation. Additional documentation includes why it was common knowledge, why it was detectable, why it was recognized practice and supporting statements or reference materials.

1 If copies of documents relied on to establish the various general duty elements cannot be obtained before issuing the citation, these documents shall be accurately quoted and identified in the file so they can be obtained later, if necessary.

2 If experts are needed to establish any elements of the violation, the experts shall be consulted before the citation is issued and their opinions noted in the file. The file shall also contain their addresses and telephone numbers.

3 The file shall contain a statement that a search has been made of the standards and that no standard applies to the cited condition.

B.2.c. (4) **Reporting General Duty Violations Not Covered by a Standard.** The Compliance Manager shall evaluate all alleged general duty clause violations to determine whether they should be referred to the Virginia Safety and Health Codes Board or federal OSHA for the development of new or revised standards. Those violations considered to be candidates for development or revision of a standard shall be forwarded through the Program Director to the Commissioner.

d. **Willful Violations.** The following definitions and procedures apply whenever the CSHO suspects that a willful violation may exist:

NOTE: *The CSHO should look carefully at all violations for elements of willfulness.*

(1) **Intentional Violation or Plain Indifference.** A willful violation exists under the Labor Laws of Virginia where the evidence shows either an intentional violation of the Labor Laws of Virginia or plain indifference to its requirements.

(a) **Intentional and Knowing.** The employer committed an intentional and knowing violation if:

1 An employer representative was aware of the requirements of the Labor Laws of Virginia, or the existence of an applicable standard or regulation, and was also aware of a condition or practice in violation of those requirements, and did not abate the hazard.

2 An employer representative was not aware of the requirements of the Labor Laws of Virginia or standards, but was aware of a comparable legal requirement (e.g., state or local law) and was also aware of a condition or practice in violation of that requirement, and did not abate the hazard.

(b) **Plain Indifference.** The employer committed a violation with plain indifference to the law where:

1 Higher management officials were aware of a VOSH requirement applicable to the company's business but made little or no effort to communicate the requirement to lower level supervisors and employees.

2 Company officials were aware of a continuing compliance problem but made little or no effort to avoid violations.

EXAMPLE: Repeated issuance of citations addressing the same or similar conditions.

3 An employer representative was not aware of any legal requirement, but was aware that a condition or practice was hazardous to the safety or health of employees and made little or no effort to determine the extent of the problem or to take the corrective action. Knowledge of a hazard may be gained from such means as insurance company reports, safety committee or other internal reports, the occurrence of illnesses or injuries, media coverage, or, in some cases, complaints of employees or their representatives.

4 In particularly flagrant situations, willfulness can be found despite lack of knowledge of either a legal requirement or the existence of a hazard if the circumstances show that the employer would have placed no importance on such knowledge even if he or she had possessed it.

(2) Evil or Malicious Intent Not Necessary. It is not necessary that the violation be committed with a malicious purpose or an evil intent to be deemed "willful." It is sufficient that the violation was deliberate, voluntary or intentional as distinguished from inadvertent, accidental or ordinarily negligent.

(3) Evidence Indicating Willfulness. The CSHO shall carefully develop and record in the file during the inspection, all evidence available that indicates employer awareness of and the disregard for statutory obligations or of the hazardous conditions. Willfulness could exist if an employer is advised by employees or employee representatives of an alleged hazardous condition and the employer

makes no reasonable effort to verify and correct the condition. Additional factors which can influence a decision as to whether violations are willful include:

B.2.d.(3)

(a) The nature of the employer's business and the knowledge regarding safety and health matters which could reasonably be expected in the industry.

(b) The precautions taken by the employer to limit the hazardous conditions.

(c) The employer's awareness of the Labor Laws of Virginia and of the responsibility to provide safe and healthful working conditions.

(d) Whether similar violations and/or hazardous conditions have been brought to the attention of the employer.

(e) Whether the nature and extent of the violations disclose a *purposeful disregard* of the employer's responsibility under the Act.

NOTE: *It is important to distinguish between the type of "knowledge" required to prove a serious violation, and the "knowledge" required for a willful violation.*

For a **serious violation**, it is **only necessary to prove that the employer knew, or reasonably should have known of the hazard and employee exposure to the hazard.** For example, in a typical trenching case, this would merely involve knowledge by the employer that they were engaged in the type of work which would require a certain type of trench to be dug, and knowledge that employees would at some point have to enter that trench.

On the other hand, the "knowledge" factor to prove a **willful violation requires proof that the employer knew or reasonably should have known that violations of the rules would be taking place, or acted in reckless disregard to whether violations of the rules would be taking place.** Using the above example of a trenching case, this would involve not only knowledge that a trench was being dug, and that employees would be entering the trench, but also knowledge that there was either inadequate shoring or lack of a trench box, etc. as required by the standard.

B.2. **e.** **Criminal/Willful Violations.** Section 40.1-49.4.K, *Code of Virginia*, provides that, "Any employer who willfully violates any safety or health provisions of this title or standard, rules or regulations adopted pursuant thereto, and that violation causes death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both such fine and imprisonment. If the conviction is for a violation committed after a first conviction or such person, punishment shall be a fine of not more than $20,000 or by imprisonment for not more than one year, of by both such fine and imprisonment."

(1) **Evaluation of All Willful, Potentially Criminal Cases.** The Compliance Manager shall carefully evaluate all willful cases involving worker deaths to determine whether they may involve criminal violations. Because the nature of the evidence available is of paramount importance in an investigation of this type, there shall be **early and close liaison** between the CSHO, the Compliance Manager, the Regional Director, the Program Director and the Office of Legal Support in developing any finding which might involve a Criminal/Willful violation.

(2) **Establishment of Criminal/Willful.** The following criteria shall be considered in investigating possible criminal/willful violations:

(a) **Required Elements.** In order to establish a criminal/willful violation, the CSHO must prove that:

1 The employer violated a VOSH standard and/or § 40.1-51.1.A.;

2 The violation was willful in nature;

3 The violation of the standard caused the death of an employee. In order to prove that the violation of the standard caused the death of an employee, there must be evidence in the file which clearly demonstrates that the violation of the standard was the cause of or a contributing factor to an employee's death.

(3) **Investigation of Criminal Willful Situations.** The difficulty of prosecuting a criminal willful violation, because of the higher burden of proof, requires special investigative techniques. To identify the persons involved who may be subject to prosecution, the CSHO shall determine who had control over the worksite and over the employees.

B.2.e.(3) **(a)** Questions which should be asked to determine who had

control over the worksite include:

1 Who had power to stop work on the site or in a particular area of the site?

2 Who had power to correct safety violations?

3 Who had the power to sign company checks to purchase goods, services or equipment to be used on the site?

4 Who could direct the work of subcontractors?

5 Who was responsible for assuring safe work practices by subcontractors?

6 Did any of the persons involved hold corporate level positions?

(b) Questions which should be asked in order to determine who had control over the employees on the site include:

1 Who had power to hire workers for the worksite?

2 Who had power to fire workers on the worksite?

3 Who could change terms of employment for workers (i.e., move them to different jobs, increase or decrease their pay, promote or demote the workers, etc.)?

4 Who had power to direct work on the site?

5 Who had power to approve time sheets approve pay and sign the workers' checks?

6 Who was responsible for assuring safe work practices on the site for company employees?

7 Who had the authority to discipline employees for safety or other work rule violations?

B.2.e.

(4) Evaluation. The Compliance Manager, in coordination with the Director of VOSH Programs, the Office of Legal Support Director and the Assistant Attorney General shall carefully evaluate all cases involving workers' deaths to determine whether they involve a criminal violation of § 40.1-49.4.K, *Code of Virginia.*

NOTE: For all fatalities, the possibility of a manslaughter prosecution exists. See definitions and procedures involved in manslaughter investigations.

(5) Compliance Manager Responsibilities. Although it is generally not necessary to issue "Miranda" warnings to an employer when a Criminal/Willful investigation is in progress, the Compliance Manager shall seek the advice of the Office of Legal Support on this question who shall consult with the Assistant Attorney General.

(a) When a jobsite fatality occurs, the CSHO and Compliance Manager shall follow the procedures for fatalities and significant case review.

(b) The Compliance Manager shall immediately telephone local law enforcement officials and the Program Director to inform them of the fatality and VOSH's ongoing investigation. The Office of Legal Support will contact the Commonwealth's Attorney.

(c) If the Compliance Manager determines that expert assistance is needed to provide the causal connection between an apparent violation of the standard and the death of an employee, such assistance shall be obtained in accordance with instructions.

(6) Procedures.

(a) If the CSHO determines that a willful violation of VOSH law and regulations has resulted in a fatality, he shall immediately notify the Compliance Manger. The Compliance Manager shall notify the Program Director , the Director of the Office of Legal Support and the Commissioner. The Compliance Manager shall immediately notify the Commonwealth's Attorney of the CSHO's findings.

(b) If the evidence supports a criminal violation of VOSH laws and regulations under the definitions set out, the Program Director shall consult with the Office of Legal Support Director, the Assistant Attorney General and the Commissioner to determine whether a criminal investigation is appropriate. At the direction of the Commissioner, the Compliance Manager or the Legal Support staff shall immediately consult with the Commonwealth's Attorney.

(c) After this determination is made, all further investigation shall be coordinated with local law enforcement officials. The Commonwealth's Attorney may determine the type and scope of investigatory procedures. Once the Commonwealth's Attorney is involved in the investigation, the CSHO shall not conduct any further questioning of the principals without prior consultation with the Commonwealth's Attorney and the Legal Support staff.

(d) When the investigation is completed, the Director of the Office of Legal Support and the director of VOSH Programs shall review the case and suggest an appropriate course of action to the Commissioner. The Commissioner, on review of the case file, shall recommend a course of action to the Commonwealth's Attorney.

(e) If the Commonwealth's Attorney determines that prosecution is warranted, the CSHO and the Office of Legal Support staff, at the direction of the Attorney General's Office and the Commissioner, shall provide the Commonwealth's Attorney with all requested support.

(f) When a willful violation is related to a fatality, the Compliance Manager shall ensure that the case file contains documentation regarding the decision NOT to make a criminal referral. The documentation should indicate which elements of a criminal violation make the case unsuitable for criminal referral.

For example, the case file documentation could state that the evidence gathered for a specific criminal/willful element did not meet the greater burden of proof for criminal prosecution.

B.2. f. Repeated Violations. An employer may be cited for a repeated violation if that employer has been cited previously for a **substantially similar condition** and the citation has become a final order. All repeated violations must be cited based on the nature of the hazardous condition, not just the code being cited.

(1) Identical Standard. Generally, similar conditions can be demonstrated by showing that in both situations the identical standard was violated.

EXCEPTION: Previously a citation was issued for a violation of § 1910.132(a) for not requiring the use of safety-toe footwear for employees. A recent inspection of the same establishment revealed a violation of §1910.132(a) for not requiring the use of head protection (hard hats). Although the same standard was involved, the hazardous conditions found were not substantially similar and therefore a repeated violation would not be appropriate.

(2) Different Standards. In some circumstances, similar conditions can be demonstrated when different standards are violated. Although there may be different standards involved, the hazardous conditions found could be substantially similar and therefore a repeated violation would be appropriate.

EXAMPLE: A citation was previously issued for a violation of § 1910.28(d)(7) for not installing standard guardrails on a tubular welded frame scaffold platform. A recent inspection of the same establishment reveals a violation of § 1910.28(c)(14) for not installing guardrails on a tube and coupler scaffold platform. Although there are different standards involved, the hazardous conditions found were substantially similar, and therefore citing a repeated violation would be appropriate.

(3) When to Issue a Repeated Violation.

(a) Time Limitations. A citation will be issued as a repeated violation if the following apply:

1 The citation is issued within three (3) years of the final order of the previous citation, or,

2 The citation is issued within three (3) years of the final abatement date of that citation, whichever is later.

EXAMPLE: A programmed inspection is conducted on 12-16-2000. A serious hazard is found and cited. Although the employer corrects the hazard at the time of inspection, and the CSHO witnesses the correction, the employer appeals the citation. An unprogrammed inspection is conducted on 1-17-2001. The CSHO finds a violation involving the same hazard which the employer had previously corrected. *Because the original violation is still under appeal, a repeated violation will not be issued*. *If* the employer had not appealed the original violation, it would be a final order and a repeated violation *would* be issued.

B.2.f.(3)

(b) Second Instance Repeated. When a violation is found during an inspection, and a repeated citation has been issued for a substantially similar condition which meets the above time limitations, the violation may be classified as a second instance repeated violation and the gravity-based penalty may be multiplied by 4 (See Chapter IV, C.2.l.)

EXAMPLE: An inspection is conducted 2-17-1997, and a violation of a particular standard is found. On 10-9-1994 a repeated violation of the same standard was cited. The violation found on 2-17-1997 may be cited as a second repeated violation.

(c) Multiple Repeated. If an employer is cited three times for a violation within three years of the date of issuance of a Citation and Notice, the violation **will be treated as a significant case**. The case shall be prepared and reviewed as such. It **may also be cited as willful,** if appropriate, and after review by the Office of the Legal Support.

(4) Employers with Multiple Establishments or Operations.

(a) No Instance of Statewide Repeated Violations. Employers with multiple establishments or operations, statewide or across VOSH regional boundaries , or without a fixed site of business, may not be cited for **statewide repeated violations where the violations occur in different VOSH Regional Office jurisdictions**.

(b) **Multi-Facility Employer Within a VOSH Region.** A multi-facility employer shall be cited for a repeated violation if the violation recurred at any worksite **within the same VOSH Regional Office jurisdiction.**

EXAMPLE: Where the construction site extends over a large area and/or the scope of the job is unclear (such as road building), that portion of the workplace specified in the employer's contract which falls within the Region Office jurisdiction is the establishment. If an employer has several worksites within the same Region Office jurisdiction, a citation of a violation at Site "A" in the region will serve as the basis for a repeated citation at Site "B" in the same region.

(5) **Joint Ventures.** When several parent companies go together in a "joint venture" to contract or complete a project, the joint venture becomes a separate entity, different from each of the parent companies. Violations cited against the joint venture will be considered only against previous citations issued against the joint venture to be considered a repeat. Parent companies involved in joint ventures are not subject to violations of the joint venture.

(6) **Repeated vs. Willful.** Repeated violations differ from willful violations in that they may result from an inadvertent, accidental or ordinarily negligent act. A willful violation need not be one for which the employer has been previously cited. Where a repeated violation also meets the criteria for willful, the violation shall be cited as willful.

(7) **Repeated vs. Failure to Abate.** Repeated violations are also to be distinguished from a failure to abate. If during a later inspection a violation of a previously cited standard is found, but such violation does not involve the same piece of equipment or the same location within an establishment or worksite, the violation may be a repeated one. If during a later inspection a violation of a previously cited standard is found on the same piece of equipment or in the same location and the evidence indicates that the violation has continued uncorrected since the original inspection, there has been a failure to abate. If, however, the violation was not continuous; i.e., if it had been corrected and reoccurred, the subsequent reoccurrence is a repeated violation. Where there is no evidence or documentation available to determine whether the violation has continued uncorrected, or whether it has been corrected and

subsequently reoccurred, it shall be cited as a repeated violation. (For more information see Chapter IIB, A. regarding follow-up and monitoring inspections, and Chapter IV, A. on verification of abatement.)

B.2.f. **(8) Alleged Violation Description (AVD).** If a repeated citation is issued, the CSHO must ensure that the cited employer is fully informed of the previous violations serving as a basis for the repeated citation, by completing box 23 of the VOSH-1B following the AVD directions for repeated violations in the IMIS Compliance Forms Manual.

g. *De Minimis* Violations. *De minimis* violations are violations of standards which have no direct or immediate relationship to safety or health. CSHOs identifying *de minimis* violations of a VOSH standard shall not issue a citation for that violation, but should verbally notify the employer and make a note of the situation in the inspection case file. The criteria for classifying a violation as *de minimis* are as follows:

(1) Employer Complies with Clear Intent of Standard. An employer complies with the clear intent of the standard but deviates from its particular requirements in a manner that has no direct or immediate relationship to employee safety or health. These deviations may involve distance specifications, construction material requirements, use of incorrect color, minor variations from recordkeeping, testing, or inspection regulations, or the like.

EXAMPLE #1: Section 1910.27(1)(ii) allows 12 inches (30 centimeters) as the maximum distance between ladder rungs. Where the rungs are 13 inches (33 centimeters) apart, the condition is *de minimis.*

EXAMPLE #2: Section 1910.28(a)(3) requires guarding on all open sides of scaffolds. Where employees are tied off with safety belts in lieu of guarding, often the intent of the standard will be met, and the absence of guarding may be *de minimis.*

EXAMPLE #3: Section 1910.217(e)(1)(ii) requires that mechanical power presses be inspected and tested at least weekly. If the machinery is seldom used, inspection and testing prior to each use is adequate to meet the intent of the standard.

(2) Employer Complies with Proposed Standard. An employer complies with a proposed standard or amendment or a consensus standard rather than with the standard in effect at the time of the

inspection and the employer's action clearly provides equal or greater employee protection or the employer complies with a written interpretation issued by OSHA or VOSH.

B.2.g. (3) **Employer Technically Exceeds Standard.** An employer's workplace is at the "state of the art" which is technically beyond the requirements of the applicable standard and provides equivalent or more effective employee safety or health protection.

NOTE: Maximum professional discretion must be exercised in determining the point at which noncompliance with a standard constitutes a de minimis violation.

3. Violations of Standards Requiring Special Documentation.

a. Violations of the Abatement Verification Standard. Under the provisions of § 307 in the *Administrative Regulations Manual,* employers are required to certify in writing when and how all cited violations have been abated. The standard also includes requirements for employee notification, and for tagging moveable equipment that is related to a violation. (See also Chapter IV.A., Abatement Verification.) (See PD 02-006A, or its successor).

(1) Employer Requirements to Tag Moveable Equipment. Only equipment, whether hand-held or not, *which is moved* within the worksite or between worksites is required to be tagged.

The tag is intended to provide an interim form of protection to employees through notification for those who may not have knowledge of the citation or the inherent hazardous condition. CSHOs should make every effort to be as detailed as possible when documenting the initial location where the violation occurred. This documentation is critical to enforcement of the tagging requirement of § 307 of the *Administrative Regulations Manual* because the tagging provision is triggered upon *movement* of the equipment.

The employer, and not the CSHO, shall apply the tags to any equipment. This is an employer responsibility.

(2) Evidence of Tagging Violations. Tag-related citations must be observed by a CSHO before a citation is issued for failure to initially tag cited moveable equipment. VOSH must be able to prove the employer's initial failure to act (tag the moveable equipment upon receipt of the citation). Where there is insufficient evidence to support

a violation of the employer's initial failure to tag or post the citation on the cited moveable equipment, a citation may be issued for failure to maintain the tag.

B.3.a. (3) **Employee Notification Violations.** Like tag-related citations, evidence of an employer's failure to notify employees of abatement activity by posting must be obtained at the worksite.

Where an employer claims that posting at the location where the violation occurred would ineffectively inform employees the employer may post the abatement activity document(s) or a summary of the document(s) in a location where it will be readily observable by affected employees and their representatives or may otherwise communicate fully with affected employees and their representatives about abatement activities.

The CSHO must determine not only whether the document(s) or summaries were appropriately posted but also whether as an alternative, other communication methods such as meetings or employee publications were used.

b. Citation of Ventilation Standards. In cases where a ventilation standard citation may be appropriate, consideration shall be given to standards intended to control exposure to recognized hazardous levels of air contaminants, to prevent fire or explosions, or to regulate operations which may involve confined space or specific hazardous conditions. In applying these standards, the following guidelines shall be observed:

(1) Health-Related Ventilation Standards. An employer is considered in compliance with a health-related airflow ventilation standard when the employee exposure does not exceed appropriate airborne contaminant standards; e.g., the PELs prescribed in § 1910.1000.

(a) Where an overexposure to an airborne contaminant is detected, the appropriate feasible administrative or engineering control shall be required; e.g., § 1910.1000(e). In no case shall citations of this standard be issued for the purpose of requiring specific volumes of air to ventilate such exposures.

(b) Other requirements contained in health-related ventilation standards shall be evaluated without regard to the concentration of airborne contaminants. Where a specific standard has been violated *and* an actual or potential hazard has been documented, a citation shall be issued.

(2) Fire-and Explosion-Related Ventilation Standards. Although they are not technically health violations, the following guidelines shall be observed when citing fire- and explosion-related ventilation standards:

(a) Adequate Ventilation. In the application of fire-and explosion-related ventilation standards, VOSH considers that an operation has *adequate* ventilation when both of the following criteria are met:

1 The requirement of the specific standard has been met.

2 The concentration of flammable vapors is 25 percent or less of the lower explosive limit (LEL).

EXCEPTION: Certain standards specify violations when 10 percent of the LEL is exceeded. These standards are found in maritime and construction exposures.

(b) Citation Policy. If 25 percent (10 percent when specified for maritime or construction operations) of the LEL has been exceeded and:

1 The standard requirements have not been met, the standard violation normally shall be cited as serious.

2 There is no applicable specific ventilation standard; § 40.1-51.A., *Code of Virginia* shall be cited in accordance with the guidelines given.

(3) Special Conditions Ventilation Standards. The primary hazards in this category are those resulting from confined space operations and welding. (See Program Directives on Confined Space, 02-065B and 02-062, or their successors.)

B.3. **c.** **Violations of the Noise Standard.** Current enforcement policy regarding § 1910.95(b)(1) may allow employers to rely on personal protective equipment and a hearing conservation program rather than engineering and/or administrative controls when employee exposure to noise is no higher than 95 dBa, or a dose of 200%. Professional judgment is necessary to supplement the general guidelines provided here. In cases where deviations from these guidelines seem to be warranted, the Compliance Manager will consult with the Program Director.

(1) Citations for violation of § 1910.95(b)(1) shall be issued when: exposure levels exceed 95 dBa for an eight hour time weighted average (TWA); engineering controls or administrative controls are feasible, both technically and economically; and these controls will achieve at least a 3 dBa reduction.

NOTE: See guidelines on technical and economic feasibility. The Program Director can provide additional information on engineering control costs and technological feasibility when requested by the Compliance Manager.

(2) For levels from 90 dBa up to and including 95 dBa, a control is not reasonably necessary when an employer has an ongoing hearing conservation program and had the results of audiometric testing indicate that existing controls and hearing protectors are adequately protecting employees. (In making this decision, such factors as exposure levels, the number of employees tested, and the duration of the testing program shall be taken into consideration).

(3) When employee noise exposures are less than 95 dBa, but the employer does not have an ongoing hearing conservation program, or the results of audiometric testing indicate that the employer's existing program is not working, citations § 1910.95(c)-(n) are appropriate. The CSHO shall consider whether:

(a) Reliance on an effective hearing conservation program would be less costly than engineering or administrative controls.

(b) An effective hearing conservation program can be established, or improvements can be made, in an existing hearing conservation program which could bring the employer into compliance with Tables G-16 or G-16a.

(c) Engineering or administrative controls are both technically and economically feasible.

(4) When comparing the degree of attenuation of personal protectors and engineering or administrative controls, all of the following factors in addition to the guidelines in the VOSH Industrial Hygiene Technical Manual must be considered and documented in the case file:

(a) **Hearing Protection.** Personal hearing protection must attenuate the occupational noise received by the employee's ears to within the levels specified in § 1910.95(c)(1). Hearing protectors shall be evaluated for the purpose of analyzing the benefits of administrative or engineering controls in accordance with Appendix B of § 1910.95.

(b) **Employee Noise Reduction by Controls.** Feasible engineering or administrative controls may only be required if a significant noise reduction can be achieved. An anticipated reduction in employee noise exposure is significant if at least a 3 dBa decrease is achieved by one or a combination of the following:

1 Source controls;

2 Controlling the industrial environment (e.g., barriers, enclosure, etc.);

3 Administrative controls.

(c) **Control Options.** When evaluating control options for the purpose of this instruction, consider all types of abatement possibilities such as the following:

1 **Partial Use of Controls.** It may be beneficial to implement some of the controls while forgoing more costly ones.

2 **Substitution.** Abatement plans may include replacing process equipment with quieter equipment that will significantly reduce exposure levels and make interim engineering controls for existing machinery impractical.

B.3.c.

(5) When hearing protection is required but not used and employee exposure exceeds the limits of Table G-16, § 1910.95(i)(2)(i) shall be cited and classified as serious whether or not the employer has instituted a hearing conservation program. Section 1910.95(a) shall no longer be cited, except in the case of the oil and gas drilling industry.

NOTE: Citations of § 1910.95(i)(2)(ii)(b) shall also be classified as serious.

(6) If an employer has instituted a hearing conservation program and a violation of the hearing conservation amendment is found [other than § 1910.95(i)(2)(i) or (i)(2)(ii)(b)], a citation shall be issued if employee noise exposure equals or exceeds an 8-hour time-weighted average of 85 dBa.

(7) If the employer has not instituted a hearing conservation program and employee noise exposures equal or exceed an 8-hour time-weighted average of 85 dBa, a citation only for § 1910.95(c) shall be issued.

(8) Violations of § 1910.95(i)(2)(i) from the hearing conservation amendment may be grouped with violations of § 1910.95(b)(1) and classified as serious when an employee is exposed to noise levels above the limits of Table G-16 and:

(a) Hearing protection is not used or is not adequate to prevent overexposure to an employee; or

(b) There is evidence of hearing loss which could reasonably be considered to:

1 Be work-related, and

2 Have been preventable, at least to some degree, if the employer had been in compliance with the cited provisions.

(9) When an employee is overexposed, citations shall not be issued in cases where no engineering or administrative controls are possible, but effective hearing protection is being provided and used.

B.3. d. **Violations of the Respirator Standard.** When considering a citation for respirator violations, the following guidelines shall be observed (see PDs 02-411 and 02-435, or their successors):

(1) When Overexposure Does Not Occur. Where an overexposure has not been established:

(a) But an improper type of respirator is being used (e.g., a dust respirator being used to reduce exposure to organic vapors), a citation under § 1910.134(b)(2) shall be issued, provided the CSHO documents that an overexposure is possible.

(b) And one or more of the other requirements of § 1910.134 is not being met, e.g., an unapproved respirator is being used to reduce exposure to toxic dusts, generally a *de minimis* violation shall be recorded in accordance with VOSH procedures. (Note that this policy does *not* include emergency use respirators.) The CSHO shall advise the employer of the elements of a good respirator program as required under § 1910.134.

(c) In *exceptional* circumstances a citation may be warranted if an adverse health condition due to the respirator itself could be supported and documented. Examples may include a dirty respirator that is causing dermatitis, a worker's health being jeopardized by wearing a respirator due to an inadequately evaluated medical condition or a significant ingestion hazard created by an improperly cleaned respirator.

(2) When Overexposure Does Occur. In cases where an overexposure to an air contaminant has been established, the following principles apply to citations of § 1910.134.

(a) Section 1910.134(a)(2) is the general section requiring employers to provide respirators "...when such equipment is necessary to protect the health of the employee" and also requiring the establishment and maintenance of a respiratory protection program which meets the requirements outlined in § 1910.134(b). If no respiratory program at all has been established, § 1910.134(a)(2) alone shall be cited. When a program has been established and some, but not all, of the requirements under § 1910.134(b) are being met, the specific

standards under § 1920.134(b) that are applicable shall be cited.

B.3.d.(2)

(b) An acceptable respiratory program includes all of the elements of § 1910.134. However, the standard is structured such that essentially the same requirement is often specified in more than one section. In these cases, the section which most adequately describes the violation shall be cited.

e. Additive and Synergistic Effects.

(1) Substances which have a known additive effect and, therefore, result in a greater probability/severity of risk when found in combination shall be evaluated using the formula found in § 1910.1000(d)(2). The use of this formula requires that the exposures have an additive effect on the same body organ or system. Caution must be used in applying the additive formula, and prior consultation with the Program Director is required.

(2) If the CSHO suspects that synergistic effects are possible, it shall be brought to the attention of the Compliance Manager, who shall refer the question to the Program Director and the Office of Legal Support Director. If it is decided that there is a synergistic effect of the substances found together, the violations shall be grouped, when appropriate, for purposes of increasing the violation classification severity and/or the penalty.

f. Absorption and Ingestion Hazards. The following guidelines apply when citing absorption and ingestion violations. Such citations do *not* depend on measurements of airborne concentrations, but shall normally be supported by wipe sampling. Citations under § 40.1-51.1.A., *Code of Virginia*, may be issued when there is reasonable probability that employees will be exposed to these hazards.

(1) Absorption Hazards. A citation for exposure to materials which can be absorbed through the skin or which can cause a skin effect (i.e., dermatitis) shall be issued where appropriate personal protective equipment (clothing) is necessary, but not worn. (See § 1910.1000, Table Z-1, substances marked "skin"). The citation shall be issued under § 1910.132(a) as either a serious or other-than-serious citation, according to the hazard.

If a serious skin absorption or dermatitis hazard exists which cannot be eliminated with protective clothing, a § 40.1-51.1.A., General Duty Clause, citation may be considered. Engineering or administrative (including work practice controls shall be required in these cases to prevent the hazard).

B.3.f. **(2) Ingestion Hazards.** A citation under § 1910.141(g)(2) and (4) shall be issued when there are employees consuming food or beverages (including drinking fountains), a significant quantity of a toxic material may be ingested and subsequently absorbed.

Where, for any substance, a serious hazard is determined to exist due to the potential of ingestion or absorption of the substance for reasons other than the consumption of contaminated food or drink (e.g., smoking materials contaminated with the toxic substance), a serious citation shall be considered under § 40.1-51.1A., or General Duty Clause.

(3) Guidelines for Improper Personal Hygiene Citations.

(a) Issuing a Citation. There are three (3) primary considerations when issuing a citation of an ingestion or absorption:

1 A health risk exists as demonstrated by one of the following:

a A potential for an illness, such as dermatitis, or

b The presence of a toxic material that can be ingested or absorbed through the skin or in some other manner. (See the Chemical Information Table.)

2 The potential that the toxic material can be ingested or absorbed, e.g., that it can be present on the skin of the employee, can be established by evaluating the conditions of use and determining the possibility that a health hazard exists.

B.3.f.(3)(a)

3 The conditions of use can be documented by taking both qualitative and quantitative results of wipe sampling into consideration when evaluating the hazard.

(b) **Supporting a Citation.** There are four (4) primary considerations which must be met to support a citation:

1 The potential for ingestion or absorption of the toxic material must represent a health hazard.

2 The ingestion or absorption of the hazardous material must represent a health hazard.

3 The toxic substance must be of such a nature and exist in such quantities as to pose a serious hazard. The substance must be present on surfaces which have hard contact (such as lunch tables, cigarettes, etc.), or on other surfaces potential for ingestion or absorption of the toxic material (e.g., a water fountain.)

4 The protective clothing or other abatement means would be effective in eliminating or significantly reducing exposure.

g. **Classification of Violations for the New Health Standards.** In general, classification decisions regarding violations of the exposure limits of the new health standards shall be governed by the Chemical Information Manual.

h. **Wipe Sampling.** In general, wipe sampling, not air sampling, will be necessary to establish the presence of a toxic material posing a potential absorption or ingestion hazard. (See IH Technical Manual for sampling procedure.

i. **Determination of Source.** Prior to the issuance of a citation, the CSHO shall carefully investigate the source or cause of the observed hazards to determine if some type of engineering, administrative or work practice control, or combination thereof, may be applied which would reduce employee exposure.

B.3. j. **Biological Monitoring.** If the employer has been conducting biological monitoring, the CSHO shall evaluate the results of such testing. The results may assist in determining whether a significant quantity of the toxic material is being ingested or absorbed through the skin.

k. **Violations of Air Contaminant Standards (§ 1910.1000 Series).** When it has been established that an employee is exposed to a toxic substance in excess of the PEL established by VOSH standards (without regard to the use of respirator protection), a citation for exceeding the air contaminant standard shall be issued. The following guidelines shall be used when a citation of the air contaminant standards may be appropriate.

(1) Requirements of the Standard.

(a) Section 1910.1000(a) through (d) provides ceiling values and 8-hour time-weighted averages (threshold limit values) applicable to employee exposure to air contaminants.

(b) Section 1910.1000(e) provides that to achieve compliance with those exposure limits, administrative or engineering controls shall first be identified and implemented to the extent feasible. When such controls do not achieve full compliance, protective equipment shall be used. Whenever respirators are used, their use shall comply with §1910.134.

(c) Section 1910.134(a) provides that when effective engineering controls are not feasible, or while they are being instituted, appropriate respirators shall be used. Their use shall comply with requirements contained in § 1910.134 which provide for the type of respirator and their proper maintenance.

(d) The situation may exist where an employer must provide all three: feasible engineering controls, feasible administrative controls (including work practice controls), and personal protective equipment. Section 1910.1000(e) has been interpreted to allow employers to implement feasible engineering controls to administrative and work practice controls in any combination the employer chooses, provided this abatement means eliminates the overexposure.

(e) Where engineering or administrative controls are feasible, the employer must institute them to mitigate contamination despite the fact that the controls would not reduce the air contaminant levels below the applicable ceiling value or threshold limit value. In addition, personal protective equipment will constitute satisfactory abatement only when implementing all feasible engineering and administrative controls fails to reduce the level of air contaminants below applicable levels.

(2) Classification of Violations of Air Contaminant Standards. The violation shall be classified as serious or other-than-serious on the basis of the requirements in the Chemical Information Manual and on the basis of the use of respiratory protection at the time of the violation. Classification of violations depends upon whether the illness is serious or other-than-serious, whether the illness is reasonably predictable at the exposure level, and whether the employer knew or could have known through reasonable diligence that a hazardous condition existed.

(a) Principles of Classification. Exposure to a substance shall be considered serious if the exposure could cause impairment to the body as described in guidelines.

1 In general, substances having a single health code of 13 or less shall be considered to be serious at any level above the Permissible Exposure Limit (PEL). Substances in categories 6, 8 and 12, however, are not considered to be serious at levels in which only mild, temporary effects would be expected to occur.

2 Substances causing irritation (i.e., categories 14 and 15) shall be considered other-than-serious up to levels at which "moderate" irritation could be expected.

3 For a substance (e.g., cyclohexanol, having multiple health codes covering both serious and other-than-serious effects, a classification of other-than-serious shall be applied up to a level at which a serious effect(s) could be expected.

4 For a substance having an ACGIH Threshold Limit Value (TLV) or a NIOSH recommended value, but no VOSH PEL, a citation for exposure in excess of the recommended value shall be considered under § 40.1-51.1, *Code of Virginia,* in accordance with the guidelines.

5 If an employee is exposed to concentrations of a substance below the PEL, but in excess of recommended value (e.g., ACGIH TLV or NIOSH recommended value), a citation for inhalation cannot normally be issued. The CSHO shall advise the employer that a reduction of the PEL has been recommended.

6 For a substance having an 8-hour PEL with no ceiling PEL but for which a ceiling ACGIH or NOISH ceiling value has been recommended, the case shall be referred to the Program Director in accordance with guidelines. If no citation is to be issued, the CSHO shall nevertheless advise the employer that a ceiling value has been recommended.

(b) Effect of Respirator Protection Factors. The CSHO shall consider protection for the type of respirator in use and the possibility of overexposure if the respirator fails. If protection factors are exceeded and if the potential for overexposure exists, a citation for failure to control excessive exposure shall be issued.

(3) Limitations on Issuing Citations of Air Contaminant Violations. No violation of the § 1910.1000 series would exist and no citation would be issued in the following circumstances:

(a) Where no identified employee exposure level is above that specified in the standard, regardless of whether engineering controls, administrative controls or personal protective equipment are utilized.

(b) Where the exposure level of an identified employee is above that specified in the standard, but all feasible engineering and administrative controls are utilized and

personal protective equipment is provided, worn and maintained in accordance with the provisions of § 1910.134.

B.3. I. Violations of the Hazard Communication Standard. Violations of the hazard communication standard shall be classified as serious whenever such violations cause or contribute to a potential exposure capable of producing serious physical harm or death. Refer to PD 02-060A, or its successor.

(1) Such violations shall be combined or grouped in accordance with guidelines. Because of the difficulty of using the penalty calculation factors for shipped containers (as opposed to in-plant hazards), the following special penalty guidelines for shipped containers shall apply:

(a) If no hazard determination has been conducted, a high severity assessment and a lesser probability assessment shall be applied to produce a GBP of $2,500.

(b) If there is no material safety data sheet (MSDS) available, or no label for a hazardous chemical (classified as serious), a high severity assessment and a greater probability assessment shall be applied to produce a GBP of $5,000.

(c) If the label has an inadequate hazard warning, or none at all, a GBP of $2,500 or $5,000 with appropriate severity and probability assessments shall be applied, depending upon significance of the missing elements.

(d) If the MSDS does not contain sufficient hazard information, a GBP of $2,500 or $5,000, with appropriate severity and probability assessments, shall be applied, depending on the significance of the missing elements.

(2) Violations of § 1910.1200(i)(2) (when the employer refuses to provide specific chemical identity information in a medical emergency) shall be classified as willful with a probability/severity factor of 5 to 10, depending on the circumstances involved in the particular case.

B. 4. Pre-citation Consultation.

a. General. In order to ensure uniformity, consistency and the legal adequacy of a limited category of citation items, there shall be appropriate consultation between Compliance Manager(s), Program Director(s), and the Office of Legal Support Director.

NOTE: This consultation is different from significant case review inasmuch as it occurs while the investigation is still under way or while draft citations are being prepared.

(1) Procedures. Consultation in accordance with program procedures shall occur when the citation items could involve important, novel or complex litigation in which the Compliance Manager would expect the investment of major litigation resources.

(a) Categories of cases where consultation shall occur are as follows:

1 All willful and general duty clause violations;

2 Complex OSH Act 4(b)(1) preemption questions involving other enforcement agencies such as MSHA, NRC or DOT;

3 Cases arising under newly promulgated safety and health standards;

4 Cases of significant public concern such as fatalities and catastrophes;

5 Cases which are likely to become major litigation vehicles in the development of VOSH law;

6 Categories of cases designated by the Office of the Attorney General and the Commissioner of Labor and Industry as being appropriate for pre-citation consultation for reasons of litigation strategy or the elimination of unnecessary duplication of effort;

7 Categories of cases that have been identified by Federal OSHA as being of significant concern on the national level;

8 In addition, the Program Director may request appropriate consultation with the Compliance Manager or the Office of Legal Support Director in other cases not listed in the above categories.

(b) Pre-citation consultation shall be conducted at the earliest possible stage of a VOSH investigation in order to assist in developing an investigation strategy, particularly in cases involving fatalities, catastrophes and cases of significant public concern.

(c) If a case involves some citation items which warrant pre-citation consultation and others which do not, the Compliance Manager may issue the routine citation items promptly and delay the issuance of only those items which require pre-citation consultation.

(d) Where required as a result of pre-citation consultation, the Compliance Manager will undertake additional investigation which may involve obtaining expert assistance.

(e) Nothing in the above procedures shall affect VOSH's responsibility and final authority to issue citations.

b. Citation Considerations.

(1) General. Section 40.1-49.4.A.1, *Code of Virginia,* controls the writing of citations.

(a) Section 40.1-49.4.A.1. "...the Commissioner...shall with reasonable promptness issue a citation to the employer." The time which has elapsed from the completion of the inspection or investigation until the issuance of citation(s) shall be closely monitored and kept as short as possible by the Compliance Manager.

1 The Compliance Manager shall issue citations as soon as possible after an inspection for safety violations and for health violations which do not require laboratory analysis of samples.

2 When potential health violations require the receipt of laboratory results before they can be cited, a citation shall be issued as soon as possible after the results are received in the Regional Office.

(b) Section 40.1-49.4.A.3. "No citation may be issued...after the expiration of six (6) months following the occurrence of any violation." Accordingly, no citation shall be issued where the date on which it is actually assigned and dated is six (6) months past when the alleged violation last occurred. Where the actions or omissions of the employer concealed the existence of the violation, the time limitation is suspended until such time as VOSH learns or could have learned of the violation. The Director of the Office of Legal Support shall be consulted prior to any such issuance.

(2) Specific Instructions. The proper writing of a citation is an essential part of the enforcement process. Specific instructions on how to complete the Citation and Notification of Penalty, VOSH-2 Form, are contained in the Integrated Management Information Systems (IMIS) Forms Manual.

(a) Standards and Regulations. After identifying a hazardous condition, the CSHO shall review existing standards and regulations to ensure that the hazardous condition noted is covered within the scope and application of the standard. Citations shall not be issued unless the citation is based on mandatory language in VOSH Standards and, when applicable, in referenced standards.

(b) Alternative Standards. In rare cases, the same factual situation may present a possible violation of more than one standard. For example, the facts which support a violation of § 1910.28(a)(1) may also support a violation of § 1910.132(a) if no scaffolding is provided when it should be and the use of safety belts is not required by the employer.

1 When more than one standard applies to a given factual situation and compliance with any of the applicable standards would effectively eliminate the hazard, alternative standards may be cited using the words, "in the alternative." A reference in the citation to each of the standards involved shall be accompanied by a separate Alleged Violation Description (AVD) which clearly alleges all of the

necessary elements of a violation of that standard.

B.4.b.(2)(b)

2 Where violations are alleged in the alternative, only one penalty, not one penalty for each standard cited, shall be proposed for the violative condition.

NOTE: Section 40.1-51.1.A., Code of Virginia, may be cited in the alternative when a specific standard is cited to cover situations in which the cited standard may not apply. Before using alternative citing, the Director of the Office of Legal Support shall be consulted.

(c) Ordering of Violations on the Citation. Violations shall be written in the numerical order in which they appear in the standards. Grouped violations shall also be written in the same order. If penalties are to be proposed for a grouped violation, the penalty shall be written across from the first violation item appearing on the VOSH-2.

(d) Ensuring Consistency of Citations with Safety and Health Evaluation. Before issuing any citation, the CSHO and the Compliance Manager will review IW-1 to ensure that the evaluations made at that time are consistent with the citations to be issued. The Compliance Manager shall note this review on the case file review notes.

1 Should any difference exist between the original evaluation and the citation, either the evaluation should be changed or the citation should not be issued.

2 An example of inconsistency between a citation and the prior safety and health evaluation are where an evaluation graded the employer at Average (2) or Above Average (3) for most of the items in IW-1 and a training violation was cited.

3 In the above example, if the initial evaluation is considered correct, the citation should not be issued, and if the facts of the case show that the earlier evaluation was incorrect, the IW-1 should be changed.

4 Where employee misconduct is a potential defense, it is also important to check this section as an adequate training program since an adequate training program is a vital part of the employer's defense.

(3) Issuing No Citation. When an inspection, either partial or comprehensive, results in a finding of no violations, a letter will be sent to the employer to inform them of the findings. (Refer to Appendix.)

5. Writing Citations.

a. Timeline for Writing Citations. Section 40.1-49.4.A. of the Code of Virginia controls the writing of citations. "...the Commissioner...shall with reasonable promptness issue a citation to the employer. No citation may be issued under this section after the expiration of six months following the occurrence of any alleged violation."

(1) The Compliance Manager shall issue citations as soon as possible after an inspection for safety violations and for health violations which do not require laboratory analysis of samples.

(2) When potential health violations require the receipt of laboratory results before they can be cited, a citation shall be issued as soon as possible after the results are received in the regional office.

(3) If questions arise concerning the 6-month statute of limitations, the Director of the Office of Legal Support shall be consulted.

NOTE: If the inspection results include some citation items which do not require extensive investigation, and others which do, those citation items which do not require extensive investigation shall be issued promptly. A new citation should be issued with a new citation number (but the same

inspection number) after the investigation of the additional hazard(s) is completed. In such cases, the employer shall be informed of the potential for additional citations, and of anticipated time frames. (See IMIS Compliance Forms Manual, Chapter 7, B.4. for instructions.)

B.5. **b. Delayed Notification of Alleged Violation.** No inspection shall be initiated where an alleged violation last occurred six months or more prior to the date on which the Department was notified of the condition. Where the actions or omissions of the employer concealed the existence of the violation, the time limitation is suspended until such time that VOSH learns or could have learned of the violation. A citation shall not be issued where any alleged violation last occurred six months or more prior to the date on which the opening conference occurred.

c. Alternative Standards. Where it appears that more than one standard is applicable to a given factual situation and that compliance with any of the applicable standards would effectively eliminate the hazard, it is permissible to cite alternative standards using the words "in the alternative." A reference in the citation to each of the standards involved shall be accompanied by a separate Alleged Violation Description (AVD) which clearly alleges all of the necessary elements of a violation of that standard. Only one penalty shall be assessed for the violative condition.

d. Compliance Manager's Authority and Responsibility to Review Citations.

(1) Elements of Review. The Compliance Manager and Engineer shall be responsible for ensuring, with regard to all citations, that:

(a) The documentation of the violation supports the citation;

(b) The language of the citation is clear and adequately communicates to the employer a clear description of the hazard (including its location) and employee exposure;

(c) The proper codes were cited; and,

(d) The penalty was calculated correctly.

B.5.d.

(2) **Substantial Deficiency Found.** If the Compliance Manager finds a substantial deficiency in the citation or the documentation (e.g., inappropriate gravity or the documentation does not support the citation), the report (with an explanation) shall be returned to the CSHO for modification.

(3) **Errors Compliance Manager May Correct.** The Compliance Manager may personally correct errors in the following: the code cited, calculation of penalty assessed, and minor inaccuracies in the citation narrative (AVD/variable information) as follows:

(a) **Justification in File and Communication to CSHO.** The Compliance Manager shall include justifications in the case file for each change and shall communicate the changes to the CSHO.

(b) **Method Used to Make Changes.** Changes shall be made by drawing a single line through the incorrect information, then writing in the correct information. The original recommendations from the CSHO must remain legible, and the Compliance Manager must initial each change.

(c) **Difference of Opinion Between CSHO and Compliance Manager.** If the Compliance Manager and the CSHO disagree about changes, such differences shall be resolved through consultation by the Compliance Manager, with the Program Director.

6. Combining and Grouping of Violations.

a. **Combining.** Violations of a **single standard** having the same classification that are found during the inspection of an establishment or worksite generally shall be combined into one alleged citation item. Normally, different facets of the same standard shall also be combined. Each instance of the violation shall be separately set out within that item of the citation. General violations of a standard may be combined with serious violations of the same standard when appropriate.

b. **Grouping.** When the source of *one* hazard is identified and involves interrelated violations of different standards, these may be grouped into a single violation.

NOTE: Except for standards which deal with many unrelated hazards, the same standard may not be cited more than once on a single citation. However, the same standard may be cited on different citations on the same inspection

Within the grouping, the most serious violation(s) should be listed first. The following situations normally call for grouping violations:

B.6.b.

(1) **Grouping Related Violations.** When the CSHO believes that violations classified as serious are so closely related as to constitute a single hazardous condition, the violations should be grouped.

(2) **Grouping Other than Serious Violations Where Grouping Results in a Serious Violation.** Two or more individual violations which, if considered individually represent other than serious violations may be grouped and alleged as a single serious violation if together they create a substantial probability of death or serious physical harm.

(3) **Where Grouping Results in Higher Gravity Other than Serious Violation.** Where the CSHO finds during the course of the inspection that a number of other than serious violations are present in the same piece of equipment which, considered in relation to each other, affect the overall gravity of possible injury resulting from an accident involving the combined violations. The violations may be grouped, although the resulting citation will be an other-than-serious violation.

(4) **Violations of Posting and Recordkeeping Requirements.** Violations of the posting and recordkeeping requirements which involve the same document, e.g., OSHA-200 Form was not posted or maintained, shall normally be grouped for penalty purposes.

c. **When Not to Group.** Times when grouping is normally inappropriate:

(1) **Single Inspection.** Only violations discovered in a single inspection of a single establishment or worksite may be grouped. An inspection in the same establishment or at the same worksite shall be considered to be a single inspection even if it continues for a period of more than one day or is discontinued with the intention of resuming it after a short period of time and only VOSH-1 is completed.

B.6.c.

(2) **Multiple Inspections.** Violations discovered in multiple inspections of a single establishment or worksite may not be grouped. An inspection in the same establishment or at the same worksite shall be considered a single inspection even if it continues for a period of more than one day or is discontinued with the intention of resuming it after a short period of time if only one VOSH-1 is completed.

(3) **Separate Establishments of the Same Employer.** Where inspections are conducted, either at the same time or different times, at two establishments of the same employer and instances of the same violation are discovered during each inspection, the employer shall be issued separate citations for each establishment. The violations shall not be grouped.

(4) **General Duty Clause Violations.** Because § 40.1-51.1.A. is cited so as to cover all aspects of a serious hazard for which no standard exists, *no* grouping of separate General Duty Clause or standard violations is permitted. This provision, however, does not prohibit grouping a § 40.1-51.1. A violation with a related violation of a specific standard.

(5) **Egregious Penalty Cases.** Violations suitable for egregious penalties (i.e., proposed as violation-by-violation citations) shall not be combined or grouped. Other violations in an egregious penalty case which are not suitable for egregious penalties may be grouped or combined. (See information on egregious penalties.)

(6) **Violations Related to a Fatality.** Violations which are directly related to a fatality may not be combined or grouped. Other violations in a fatality case which are not directly related to the fatality may be grouped or combined.

7. **Multi-Employer Worksites.** On multi-employer worksites, both construction and non-construction, citations normally shall be issued to employers whose employees are exposed to hazards (the **exposing employer**). An exposing employer has an affirmative defense to a citation discussed below in B.7.c. (see VOSH ARM §260.G).

a. **Additional Categories of Employers.** Additionally, the following construction and non-construction employers normally shall be cited, whether or not their own employees are exposed (see VOSH ARM §260.F.):

B.7.a.

(1) The employer who actually creates the hazard (**creating employer**);

(2) The employer who is either:

(a) responsible, by contract or through actual practice, for safety and health conditions on the entire worksite, and has the authority for ensuring that the hazardous condition is corrected (**general contractor controlling employer**); or

(b) responsible, by contract or through actual practice, for safety and health conditions for a specific area of the worksite, or specific work practice, or specific phase of a construction project, and has the authority for ensuring that the hazardous condition is corrected (**prime sub-contractor controlling employer**);

(3) The employer who has the responsibility for actually correcting the hazard (**correcting employer**).

b. Knowledge of Hazardous Condition. It must be shown that each employer to be cited has knowledge of the hazardous condition or could have had such knowledge with the exercise of reasonable diligence.

c. Legitimate Defense to Citation. The multi-employer worksite defense is now codified in VOSH ARM §260.G. and it provides as follows:

A citation issued under subsection 260.F., to an exposing employer who violates any VOSH law, standard, rule or regulation, shall be vacated if such employer demonstrates that:

(1) The employer did not create the hazard;

(2) The employer did not have the responsibility or the authority to have the hazard corrected;

(3) The employer did not have the ability to correct or remove the hazard;

(4) The employer can demonstrate that the creating, the controlling and/or the correcting employers, as appropriate, have been specifically notified of the hazards to which his employees were exposed;

(5) The employer has instructed his employees to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it;

(6) Where feasible, an exposing employer must have taken appropriate alternative means of protecting employees from the hazard; and

(7) When extreme circumstances justify it, the exposing employer shall have removed his employees from the job.

NOTE: All of these items must be documented in the case file.

d. Determination of Which Employer(s) to Cite. On multi-employer worksites (in all industry sectors), more than one employer may be citable for a hazardous condition that violates a VOSH standard. A two-step process must be followed in determining whether more than one employer is to be cited.

Step One: The first step is to determine whether the employer is a creating, exposing, correcting, or controlling employer. The definitions in paragraphs (1) - (4) below explain and give examples of each. Remember that an employer may have multiple roles. Once you determine the role of the employer, go to Step Two to determine if a citation is appropriate.

NOTE: Only exposing employers can be cited for General Duty Clause violations.

Step Two: If the employer falls into one of these categories, it has obligations with respect to VOSH requirements. Step Two is to determine if the employer's actions were sufficient to meet those obligations. The extent of the actions required of employers varies based on which category applies.

Note that the extent of the measures that a controlling employer must take to satisfy its duty to exercise reasonable care to prevent and detect violations is less than what is required of an employer with respect to protecting its own employees.

B.7.d. (1) Creating Employer.

Step 1: Definition: The employer that caused a hazardous condition that violates an OSHA standard.

Step 2: Actions Taken: Employers must not create violative conditions. An employer that does so is citable even if the only employees exposed are those of other employers at the site.

Example 1: The owner/operator of a factory contracts with Employer S to service machinery. The owner fails to cover drums of a chemical despite Employer S's repeated requests that it do so. This results in airborne levels of the chemical that exceed the permissible exposure limit (PEL).

Analysis:

Step 1: The owner is a creating employer because it caused employees of Employer S to be exposed to the air contaminant above the PEL.

Step 2: The owner failed to implement measures to prevent the accumulation of the air contaminant. It could have met its obligation by implementing the simple engineering control of covering the drums. Having failed to implement a feasible engineering control to meet the PEL, the owner is citable for the hazard.

Example 2: On a construction site, Employer M hoists materials onto the 8th floor, damaging perimeter guardrails. Neither its own employees nor employees of other employers are exposed to the hazard. It takes effective steps to keep all employees, including those of other employers, away from the unprotected edge (e.g., warning lines and warning signs cordoning off the area of damaged guard rails) and informs the controlling employer of the problem. Employer M lacks authority to fix the guardrails itself.

Analysis:

Step 1: Employer M is a creating employer because it caused a hazardous condition by damaging the guardrails.

Step 2: While it lacked the authority to fix the guardrails, it took immediate and effective steps to keep all employees

away from the hazard and notified the controlling employer of the hazard. Employer M is not citable since it took effective measures to prevent employee exposure to the fall hazard.

B.7.d. (2) Exposing Employer.

Step 1: Definition: An employer whose own employees are exposed to the hazard. See VOSH FOM Chapter III, section B.1.b. for a discussion of what constitutes exposure.

Step 2: Actions taken: If the exposing employer created the violation, it is citable for the violation as a creating employer. If the violation was created by another employer, the exposing employer is citable if it:

(a) knew of the hazardous condition or failed to exercise reasonable diligence to discover the condition; and,

(b) failed to take steps consistent with its authority to protect its employees. If the exposing employer has authority to correct the hazard, it must do so. If the exposing employer lacks the authority to correct the hazard, it is citable if it fails to do each of the following: (1) ask the creating and/or controlling employer to correct the hazard; (2) inform its employees of the hazard; and (3) take reasonable alternative protective measures. In extreme circumstances (e.g., imminent danger situations), the exposing employer is citable for failing to remove its employees from the job to avoid the hazard.

Example 3: Subcontractor S is responsible for inspecting and cleaning a work area in a factory around a large, permanent hole at the end of each day. A VOSH standard requires guardrails. There are no guardrails around the hole and Subcontractor S employees do not use personal fall protection, although it would be feasible to do so. Subcontractor S has no authority to install guardrails. However, it did ask the owner/operator of the plant to install them. The owner refused to install guardrails.

Analysis:

Step 1: Subcontractor S is an exposing employer because its employees are exposed to the fall hazard.

Step 2: While Subcontractor S has no authority to install guardrails, it is required to comply with VOSH requirements to the extent feasible. It must take steps to protect its employees and ask the employer that controls the hazard - the owner/operator of the factory - to correct it. Although Subcontractor S asked for guardrails, since the hazard was not corrected, Subcontractor S was responsible for taking reasonable alternative protective steps, such as providing personal fall protection. Because that was not done, Subcontractor S is citable for the violation.

Example 4: On a construction site, unprotected rebar on either side of an access ramp presents an impalement hazard. Subcontractor E, an electrical subcontractor, does not have the authority to cover the rebar. However, several times Subcontractor E asked the general contractor to cover the rebar. In the meantime, Subcontractor E instructed its employees to use a different access route that avoided most of the uncovered rebar and required them to keep as far from the rebar as possible.

Analysis:

Step 1: Since Subcontractor E employees were still exposed to some unprotected rebar, Subcontractor E is an exposing employer.

Step 2: Subcontractor E made a good faith effort to get the general contractor to correct the hazard and took feasible measures within its control to protect its employees. Subcontractor E is not citable for the rebar hazard.

B.7.d._____(3) Correcting Employer.

Step 1: Definition: An employer who is engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting a hazard. **This usually occurs where an employer is given the responsibility of installing and/or maintaining particular safety/health equipment or devices.**

Step 2: Actions taken: The correcting employer must exercise reasonable care in preventing and discovering violations and meet its obligations of correcting the hazard.

Example 5: Subcontractor C, a carpentry contractor, is hired to erect and maintain guardrails throughout a large, 15-story project. Work is proceeding on all floors. Subcontractor C inspects all floors in the morning and again in the afternoon each day. It also inspects areas where material is delivered to the perimeter once the material vendor is finished delivering material to that area. Other subcontractors are required to report damaged/missing guardrails to the general contractor, who forwards those reports to Subcontractor C, who regularly repairs any damaged guardrails immediately after finding them and immediately after they are reported.

On this project, few instances of damaged guardrails have occurred other than where material has been delivered. Shortly after the afternoon inspection of the 6th floor, workers moving equipment accidentally damage a guardrail in one area. No one tells Subcontractor C of the damage and Subcontractor C has not seen it. A VOSH inspection occurs at the beginning of the next day, prior to the morning inspection of the 6th floor. None of Subcontractor C's own employees are exposed to the hazard, but employees of other subcontractors are exposed.

Analysis:

Step 1: Subcontractor C is a correcting employer since it is responsible for erecting and maintaining fall protection equipment.

Step 2: The steps Subcontractor C implemented to discover and correct damaged guardrails were reasonable in light of the amount of activity and size of the project. It exercised reasonable care in preventing and discovering violations; therefore, it is not citable for the damaged guardrail since it could not reasonably have known of the violation.

B.7.d. (4) Controlling Employer.

(a) VOSH ARM §260.F.2. provides that citations can issue against a general contractor as a controlling employer, as well as a prime subcontractor in its role as a controlling employer, when their own employees are not exposed to the hazardous condition:

B.7.d.(4)(a)

1 **General Contractor:** Responsible, by contract or through actual practice, for safety and health conditions on the entire worksite, and has the authority for ensuring that the hazardous condition is corrected; or

2 **Prime Subcontractor:** Responsible, by contractor through actual practice for safety and health conditions for a specific area of the worksite, or specific work practice, or specific phase of a construction project, and has the authority for ensuring that the hazardous condition is corrected.

B.7.d.(4)_____(b) **Step 1: Definition:** An employer who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them; **or** who has responsibility, by contract or through actual practice for safety and health conditions for a specific area of the worksite, or specific work practice, or specific phase of a construction project, and has the authority for ensuring that the hazardous condition is corrected. Control can be established by contract or, in the absence of explicit contractual provisions, by the exercise of control in practice. Descriptions and examples of different kinds of controlling employers are given below.

(c) **Step 2: Actions Taken:** A **general contractor controlling employer** must exercise reasonable care to prevent and detect violations on the entire site. A prime subcontractor controlling employer must exercise reasonable care to prevent and detect violations for the specific area, specific work practice or specific phase of the project for which it is responsible.

The extent of the measures that a controlling employer must implement to satisfy this duty of reasonable care is less than what is required of an employer with respect to protecting its own employees. In the case of a general contractor controlling employer, this means that it is not normally required to inspect for hazards as frequently or to have the same level of

knowledge of the applicable standards or of trade expertise as the employer it has hired. In the case of a prime subcontractor controlling employer, this means that it is not normally required to inspect for hazards as frequently as the employer it has hired.

B.7.d.(4) (d) **Factors Relating to Reasonable Care Standard.** Factors that affect how frequently and closely a controlling employer must inspect to meet its standard of reasonable care include:

1 The scale of the project;

2 The nature and pace of the work, including the frequency with which the number or types of hazards change as the work progresses;

3 How much the controlling employer knows both about the safety history and safety practices of the employer it controls and about that employer's level of expertise.

4 More frequent inspections are normally needed if the controlling employer knows that the other employer has a history of non-compliance. Greater inspection frequency may also be needed, especially at the beginning of the project, if the controlling employer had never before worked with this other employer and does not know its compliance history.

5 Less frequent inspections may be appropriate where the controlling employer sees strong indications that the other employer has implemented effective safety and health efforts. The most important indicator of an effective safety and health effort by the other employer is a consistently high level of compliance. Other indicators include the use of an effective, graduated system of enforcement for non-compliance with safety and health requirements coupled with regular jobsite safety meetings and safety training.

B.7.d.(4) (e) **Evaluating Reasonable Care.** In evaluating whether a

controlling employer has exercised reasonable care in preventing and discovering violations, consider questions such as whether the controlling employer:

1 Conducted periodic inspections of appropriate frequency (frequency should be based on the factors listed above);

2 Implemented an effective system for promptly correcting hazards;

3 Enforces the other employer's compliance with safety and health requirements with an effective, graduated system of enforcement and follow-up inspections.

(f) Types of General Contractor Controlling Employers

1 Control Established by Contract.

In this case, the employer has a specific contract right to control safety. To be a controlling employer, the employer must itself be able to prevent or correct a violation or to require another employer to prevent or correct the violation. One source of this ability is explicit contract authority. This can take the form of a specific contract right to require another employer to adhere to safety and health requirements and to correct violations the controlling employer discovers.

Example 6: An owner/operator of a plant contracts with Employer S to do sandblasting at the plant. Some of the work is regularly scheduled maintenance and so is general industry work; other parts of the project involve new work and are considered construction. Respiratory protection is required. Further, the contract explicitly requires Employer S to comply with safety and health requirements.

Under the contract, the owner has the right to take various actions against Employer S for failing to meet contract requirements, including the right to have non-compliance corrected by using other workers and back-charging for that work. Employer S is one of two employers under contract with the owner at the work

site, where a total of five employees work. All work is done within an existing building.

The number and types of hazards involved in Employer S's work do not significantly change as the work progresses. Further, the owner has worked with Employer S over the course of several years. Employer S provides periodic and other safety and health training and uses a graduated system of enforcement of safety and health rules. Employer S has consistently had a high level of compliance at its previous jobs and at this site.

The owner monitors Employer S by a combination of weekly inspections, telephone discussions and a weekly review of Employer S's own inspection reports. The owner has a system of graduated enforcement that it has applied to Employer S for the few safety and health violations that had been committed by Employer S in the past few years. Further, due to respirator equipment problems Employer S violates respiratory protection requirements two days before the owner's next scheduled inspection of Employer S. The next day there is a VOSH inspection. There is no notation of the equipment problems in Employer S's inspection reports to the owner and Employer S made no mention of it in its telephone discussions.

B.7.d.(4)(f)1

Analysis:

Step 1: The owner/operator is a controlling employer because it has general supervisory authority over the worksite, including contractual authority to correct safety and health violations.

Step 2: The owner has taken reasonable steps to try to make sure that Employer S meets safety and health requirements. Its inspection frequency is appropriate in light of the low number of workers at the site, lack of significant changes in the nature of the work

and types of hazards involved, the owner's knowledge of Employer S's history of compliance and its effective safety and health efforts on this job. The owner has exercised reasonable care and is not citable for this condition.

B.7.d.(4)(f)1

Example 7: On a construction site, the general contractor contracts with Employer P to do painting work. The general contractor has the same contract authority over Employer P as the owner/operator had in Example 6. The general contractor has never before worked with Employer P. The general contractor conducts inspections that are sufficiently frequent in light of the factors listed above. Further, during a number of its inspections, the general contractor finds that Employer P has violated fall protection requirements. It points the violations out to Employer P during each inspection but takes no further actions.

Analysis:

Step 1: The general contractor is a controlling employer since it has general super-visory authority over the site, including a contractual right of control over Employer P.

Step 2: The general contractor took adequate steps to meet its obligation to discover violations. However, it failed to take reasonable steps to require Employer P to correct hazards since it lacked a graduated system of enforcement. A citation to the general contractor for the fall protection violations is appropriate.

Example 8: On a construction site, the general contractor contracts with Subcontractor E, an electrical subcontractor. The general contractor has full contract authority over Subcontractor E, as in Example 6. Subcontractor E installs an electric panel box exposed to the weather and implements an assured equipment grounding conductor program, as required under the contract. It fails to connect a grounding wire inside the box to one of the outlets.

This incomplete ground is not apparent from a visual inspection. Further, the general contractor inspects the site with a frequency appropriate for the site in light of the factors discussed above. It saw the panel box but did not test the outlets to determine if they were all grounded because Subcontractor E represents that it is doing all of the required tests on all receptacles. The general contractor knows that Subcontractor E has implemented an effective safety and health program. From previous experience, it also knows Subcontractor E is familiar with the applicable safety requirements and is technically competent. The general contractor had asked Subcontractor E if the electrical equipment is OK for use and was assured that it was.

Analysis:

Step 1: The general contractor is a controlling employer since it has general supervisory authority over the site, including a contractual right of control over Subcontractor E.

Step 2: The general contractor exercised reasonable care. It had determined that Subcontractor E had technical expertise, safety knowledge and had implemented safe work practices. It conducted inspections with appropriate frequency. It also made some basic inquiries into the safety of the electrical equipment. Under these circumstances, the general contractor was not obligated to test the

outlets itself to determine if they were all grounded. It is not citable for the grounding violation.

B.7.d.(4)(f)_____2

Control Established by a Combination of Other Contract Rights.

Where there is no explicit contract provision granting the right to control safety, or where the contract says the employer does not have such a right, an employer may still be a controlling employer. The ability of an employer to control safety in this circumstance can result from a combination of contractual rights that, together, give it broad responsibility at the site involving almost all aspects of the job. Its responsibility is broad enough so that its contractual authority necessarily involves safety. The authority to resolve disputes between subcontractors, set schedules and determine construction sequencing are particularly significant because they are likely to affect safety.

NOTE: Citations should only be issued in this type of case after consulting with the Office of Legal Support.

Example 9: Construction Management Firms - Construction Manager M is contractually obligated to: set schedules and construction sequencing, require subcontractors to meet contract specifications, negotiate with trades, resolve disputes between subcontractors, direct work and make purchasing decisions which affect safety. However, the contract states that Construction Manager M does not have a right to require compliance with safety and health requirements. Further, Subcontractor S asks Construction Manager M to alter the schedule so that Subcontractor S would not have to start work until Subcontractor G has completed installing guardrails. Construction Manager M is contractually responsible for deciding whether to approve Subcontractor S's request.

Analysis:

Step 1: Even though its contract states that Construction Manager M does not have authority over safety, the combination of rights actually given in the contract provides broad responsibility over the site and results in the ability of Construction Manager M to direct actions that necessarily affect safety. For example, Construction Manager M's contractual obligation to determine whether to approve Subcontractor S's request to alter the schedule has direct safety implications. Construction Manager M's decision relates directly to whether Subcontractor S's employees will be protected from a fall hazard. Construction Manager M is a controlling employer.

Step 2: In this example, if Construction Manager M refused to alter the schedule, it would be citable for the fall hazard violation.

B.7.d.(4)(f)2

Example 10: Employer ML's contractual authority is limited to reporting on subcontractors' contract compliance to the owner/developer and making contract payments. Although it reports on the extent to which the subcontractors are complying with safety and health infractions to the owner, Employer ML does not exercise any control over safety at the site.

Analysis:

Step 1: Employer ML is not a controlling employer because these contractual rights are insufficient to confer control over the subcontractors and Employer ML did not exercise control over safety. Reporting safety and health infractions to another entity does not, by itself (or in combination with these very limited contract rights), constitute an exercise of control over safety.

Step 2: Since it is not a controlling employer,

it had no duty under the OSH Act to exercise reasonable care with respect to enforcing the subcontractors' compliance with safety; there is, therefore, no need to go to Step 2.

B.7.d.(4)(f) 3 Architects and Engineers

Architects, engineers, and other entities are controlling employers only if the breadth of their involvement in a construction project is sufficient to bring them within the parameters discussed above.

Example 11: Architect A contracts with the owner to prepare contract drawings and specifications, inspect the work, report to the owner on contract compliance, and to certify completion of work. Architect A has no authority or means to enforce compliance, no authority to approve/reject work and does not exercise any other authority at the site, although it does call the general contractor's attention to observed hazards noted during its inspections.

Analysis:

Step 1: Architect A's responsibilities are very limited in light of the numerous other administrative responsibilities necessary to complete the project. It is little more than a supplier of architectural services and conduit of information to the owner. Its responsibilities are insufficient to confer control over the subcontractors and it did not exercise control over safety. The responsibilities it does have are insufficient to make it a controlling employer. Merely pointing out safety violations did not make it a controlling employer.

NOTE: *In a circumstance such as this, it is likely that broad control over the project rests with another entity.*

Step 2: Since Architect A is not a controlling employer, it had no duty under the OSH Act to exercise reasonable care with respect to enforcing the subcontractors' compliance with safety; there is, therefore, no need to go to Step 2.

Example 12: Engineering firm E has the same contract authority and functions as in Example 9.

Analysis:

Step 1: Under the facts in Example 9, Engineering Firm E would be considered a controlling employer.

Step 2: The same type of analysis described in Example 9 for Step 2 would apply here to determine if Engineering Firm E should be cited.

B.7.d.(4)(f) 4 **Control Without Explicit Contractual Authority.** Even where an employer has no explicit contract rights with respect to safety, an employer can still be a controlling employer if, in actual practice, it exercises broad control over subcontractors at the site (see Example 9).

NOTE: *Citations should only be issued in this type of case after consulting with the Office of Legal Support.*

Example 13: Construction Manager M does not have explicit contractual authority to require subcontractors to comply with safety requirements, nor does it explicitly have broad contractual authority at the site. However, it exercises control over most aspects of the

subcontractors' work anyway, including aspects that relate to safety.

Analysis:

Step 1: Construction Manager M would be considered a controlling employer since it exercises control over most aspects of the subcontractor's work, including safety aspects.

Step 2: The same type of analysis on reasonable care described in examples # 6, # 7 and 8 of Section B.7.d.(4)(f)1 would apply to determine if a citation should be issued to this type of controlling employer.

B.7.d.(4)(f) **5 Multiple Roles.**

a **Creating, Correcting or Controlling Employers.** These employers will often also be an exposing employer. Consider whether the employer is an exposing employer before evaluating its status with respect to these other roles.

b **Exposing, Creating and Controlling Employers.** These employers can also be correcting employers if they are authorized to correct the hazard.

(g) **Prime Subcontractor Controlling Employers.** ARM § 260.F.2.B. provides that citations may be issued to an employer who is not a general contractor, but is:

"responsible, by contract or through actual practice, for safety and health conditions for a specific area of the worksite, or specific work practice, or specific phase of a construction project, and has the authority for ensuring that the hazardous condition is corrected (the **prime contractor controlling employer**);

B.7.d.(4)(g)

NOTE: *An example of a prime subcontractor controlling employer would be where the main framing contractor has subcontracted framing work out to another subcontractor who creates a hazard, and the main framing subcontractor knew or should have known of the hazard and was responsible by contract or through actual practice for that area of the worksite.*

There will be instances where the individual facts of a case warrant citing both a general contractor and a prime subcontractor as *controlling* employers, but in many cases, due to recent changes in construction industry business practices, it will be more appropriate to cite a prime subcontractor in lieu of the general contractor as the *controlling* employer on the site (e.g., recent VOSH inspections have found instances where an accident was caused by a "sub of a sub of a sub" where the general contractor had not even been made aware of the subcontractor's presence on the worksite by their initial subcontractor).

The following facts are from an actual VOSH accident inspection involving such a business arrangement:

The accident involved a truss collapse during the construction of an 8 unit townhouse, and the general contractor had hired a reputable framing subcontractor, who then subcontracted the truss installation to a second subcontractor who was not experienced in the particular type of truss system being used. The trusses were not braced in accordance with the manufacturer's instructions and they collapsed. After reviewing the specific facts of the case, the VOSH program issued citations related to the accident to the framing subcontractor and its subcontractor, but not to the general contractor.

Facts that are looked at in such a case to determine which companies will receive citations include, but are not limited to:

- contractual rights and responsibilities,

- actual work practices on the site,

- whether the individual employers knew or should have known of the hazard (i.e., employer knowledge),

- whether employers had provided adequate safety and health programs and trained their employees,

- whether employers had complied with VOSH standards requiring frequent and regular inspections of the job site;

- what was the level of technical expertise and experience of the employers involved,

- how long the hazard was in existence before the accident occurred, etc.

B.7. **e. Employees vs. Independent Contractors.** Determining whether a worker is an employee or an independent contractor is often important, especially when that person is the only one exposed to the hazard. When an employer asserts that the worker is not an employee, but an independent contractor, the CSHO should determine the answers to the following questions:

(1) Who has the responsibility to control the workers?

(2) Does the alleged employer have power to control the workers?

(3) Who pays the workers' wages?

(4) Whom do the workers consider their employer?

(5) Does the alleged employer have the power to hire, fire or modify the employment condition of the workers?

(6) Does the ability of the workers to increase their income depend on efficiency rather than on initiative, judgment or foresight?

(7) How are the workers' wages established?

NOTE: *The existence of signed releases, tax forms, or other documents does not necessarily determine workers' status under the VOSH program. The key is examining the workers' relationship to the employer, using the questions above. Consult with the Office of Legal Support in all cases when questions arise regarding who is an employee and who is an independent contractor.*

B. 8. Employer/Employee Responsibilities.

a. Section 40.1-51.2(a), *Code of Virginia:* "It shall be the duty of each employee to comply with occupational safety and health standards and all rules, regulations and orders issued pursuant to this chapter which are applicable to his own actions and conduct."

(1) The law does not provide for the issuance of citations or the proposal of penalties against employees. Employers are responsible for employee compliance with the standards.

(2) Although the employer is not the absolute guarantor or insurer of all employee actions, reasonable steps must be taken by the employer to protect employees from hazards that may result from failure to comply with the standards; e.g., informing employees of hazards and how to protect themselves, enforcing safety and health rules, and the like.

b. Employee Refusal to Comply. In cases where the CSHO determines that employees are systematically refusing to comply with a standard applicable to their own actions and conduct, the matter shall be referred to the Compliance Manager, who shall consult with the Program Director, for discussion and advice. Under no circumstances is the CSHO to become involved in an onsite dispute involving labor-management issues or interpretation of collective-bargaining agreements. The CSHO is expected to obtain enough information to understand whether the employer is using all appropriate authority to ensure compliance with VOSH laws, standards and regulations. However, concerted refusals to comply will not bar the issuance of an appropriate citation where the employer has failed to exercise full authority to the maximum extent reasonable, including discipline and discharge, to ensure compliance with the law.

B.8 c. **Employer Exercise of Authority.** Under no circumstances is the CSHO to become involved in an *on-site* dispute involving labor/management issues or interpretation of collective-bargaining agreements. The CSHO is expected to obtain enough information to understand whether the employer is using all appropriate authority to ensure compliance with VOSH laws, standards and regulations. Concerted refusals to comply will not bar the issuance of an appropriate citation where the employer has failed to exercise full authority to the maximum extent reasonable, including discipline and discharge.

B. 9. Affirmative Defenses.

a. Definition. An affirmative defense is any matter which, if established by the employer, will excuse the employer from a violation which has otherwise been proven by VOSH.

b. Burden of Proof. Although affirmative defenses must be proven by the employer at the time of the hearing, VOSH must be prepared to respond whenever the employer is likely to raise or actually does raise an argument supporting such a defense. The CSHO shall keep in mind the potential affirmative defenses that the employer may make and, during the inspection, shall attempt to gather contrary evidence.

c. Common Affirmative Defenses. The following are explanations of the more common affirmative defenses with which the CSHO shall become familiar. There are other affirmative defenses besides these, but they are less frequently raised or are such that the facts which can be gathered during the inspection are minimal.

(1) Unpreventable Employee Misconduct or "Isolated Event."

(a) The employer has established work rules designed to prevent the violation;

(b) It has adequately communicated these rules which were effectively communicated and uniformly enforced;

(c) It has taken steps to discover the violation; and

(d) It has effectively enforced the work rules when violations have been discovered.

B.9.c. (2) **Investigation of Employee Misconduct.** The following example illustrates the questions to be asked about employee misconduct situations. An unguarded table saw is observed. The saw, however, has a guard which is reattached while the CSHO watches. Facts which the CSHO shall document may include:

(a) Who removed the guard and why?

(b) Did the employer know that the guard had been removed?

(c) How long or how often had the saw been used without guards?

(d) Did the employer have a work rule that the saw guards not be removed?

(e) How was the work rule communicated?

(f) Was the work rule enforced?

(g) Were there written training procedures?

(h) Were there training records?

(I) Were there disciplinary policies?

(j) Was the disciplinary policy enforced?

(3) Impossibility. In some instances, compliance is impossible. In this case, compliance with the requirements of a standard would:

(a) Be functionally impossible or would prevent performances of required work; and

(b) Necessitate that there are no alternative means of employee protection.

EXAMPLE: During the course of the inspection an unguarded table saw is observed. The employer states that the nature of its work makes a guard unworkable. Facts

which the CSHO shall document may include: Would a guard make performance of the work impossible or merely more difficult? Could a guard be used part of the time? Has the employer attempted to use guards? Has the employer considered alternative means or methods of avoiding or reducing the hazard?

B.9.c. **(4) Greater Hazard.** Compliance with a standard would result in greater hazards to employees than non-compliance and:

(a) There are no alternative means of employee protection; and

(b) An application of a variance would be inappropriate.

EXAMPLE: The employer indicates that a saw guard had been removed because it caused particles to be thrown into the operator's face. Facts which the CSHO shall consider may include: Was the guard used properly? Would a different type of guard eliminate the problem? How often was the operator struck by particles and what kind of injuries resulted? Would safety glasses, a face mask, or a transparent shelf attached to the saw prevent injury? Was operator technique at fault and did the employer attempt to correct it? Was a variance sought?

NOTE: The Office of Legal Support is responsible for processing all variance requests.

(5) Documentation Requirements. When it is reasonable to assume an affirmative defense may be an issue, the CSHO shall make efforts to gather and record facts relevant to the defense. Closing conferences are often a good opportunity to examine employee misconduct questions. The CSHO shall bring the documentation of the hazards and facts related to possible affirmative defenses to the attention of the Compliance Manager. Where it appears that every element of an affirmative defense is present, the Compliance Manager may decide, after consultation with the Program Manager and the Office of Legal Support Director, that a citation shall not be issued.